No. 230.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

ALBION LUMBER COMPANY,
(a Corporation),
Plaintiff in Error,

vs.

MARIA de NOBRA, Administratrix of the Estate of Jose de Nobra, Deceased,
Defendant in Error.

TRANSCRIPT OF RECORD.

In Error to the Circuit Court of the United States for the Northern District of California.

INDEX.

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

MARIA DE NOBRA, as the Administratrix of the Estate of Jose De Nobra, Deceased, Plaintiff, vs. ALBION LUMBER COMPANY (a Corporation), Defendant.		At Law. Number 11,913.

Complaint.

And now comes said plaintiff as said administratrix, and complains of said defendant, and for cause of action alleges:

I.

That said plaintiff, Maria De Nobra, is now, and always has been an alien to the Government of the United States; that she is a native of the Kingdom of Portugal, and is now and always has been a subject of the King of Portugal; that said deceased, at the time of his death was, and always had been, an alien to the Government of the United States; that he was a native of the Kingdom of Portugal, and during his whole lifetime was a subject of the King of Portugal; that said defendant, the Albion Lumber Company (a corporation), during all of the time herein mentioned, was and ever has been and yet is a corporation, organized and existing pursuant to the laws of the State of Califor-

nia, with its principal place of business and its offices within the City and County of San Francisco, and also doing business in the County of Mendocino, in said State, all of which is in the Northern District of California; that the matter in dispute in this suit exceeds, exclusive of interest and costs, the sum or value of two thousand ($2,000) dollars; that the matter in dispute herein is the sum or value of fifty thousand ($50,000) dollars, and is a controversy between an alien to the Government of the United States and a citizen of the State of California.

That said Jose De Nobra and this plaintiff intermarried on or about the ....th day of June, 1879, and from thence up to the time of the death of said Jose De Nobra, which occurred on or about the 13th day of June, 1893, in said County of Mendocino, State of California, were husband and wife.

That on or about the 29th day of March, 1894, this plaintiff, as the widow of said Jose De Nobra, filed her petition in the Superior Court of the County of Alameda, State of California, asking that she be appointed the administratrix of the estate of the said Jose De Nobra, deceased; that thereafter, to-wit: on or about the 16th day of April, 1894, and upon the hearing of said petition, said Superior Court duly made and entered an order in said matter, appointing this plaintiff the administratrix of the estate of said Jose De Nobra, deceased; that thereafter, to-wit: on the 10th day of May, 1894, this plaintiff filed her bond and duly qualified as said administratrix, and immediately thereafter, to-wit: on said 10th day of May, 1894, said court issued letters of administration

to this plaintiff as the administratrix of the estate of Jose De Nobra, deceased; that immediately thereafter this plaintiff entered upon the discharge of her duties as such administratrix, and from thence hitherto has acted, and is now acting, as such, and now brings this suit as the administratrix of the estate of Jose De Nobra, deceased, and as his heir and legal representative.

II.

That the purpose for which said defendant corporation was formed, among other things were "to own, " acquire by purchase or otherwise lease, build, con- " struct, operate, run, manage, and maintain railways, " railroads, rights-of-ways, roadbeds, superstructures, " engines, cars, depots, stations, machinery, and all " the appurtenances of a railroad, shares of stock in " a railroad, and other corporations, goods, wares and " merchandise, and all other property, real and per- " sonal, rights and privileges and franchises and " appurtenances."

III.

That at all the times herein mentioned, and for a long time prior thereto, said defendant was, and now is the owner of, in the possession of, and engaged in managing and operating that certain railroad, sometimes called, "The Albion River Railroad," and commencing at a point on or near the Albion river in the County of Mendocino, State of California, and running thence through or near Township sixteen (16) North, Range sixteen (16) West, Mount Diablo Base and Meridian, for a distance of about thirteen (13)

miles into what is known as the Redwoods, in said County of Mendocino.

That said defendant, during all of the times herein mentioned was engaged in managing and operating said railroad, its roadbed, tracks, cars, locomotives, and appurtenances, and appliances belonging to said road, for the purpose of carrying passengers, and moving freight on, and over said roadbed, and during all of said time, said defendant had the exclusive and sole control and management of its said railroad, its roadbed, cars, tracks, locomotives, and all the appurtenances in any manner belonging to said road.

IV.

That during all of said time herein mentioned, and for a long time prior thereto, said defendant wholly failed and neglected to erect and maintain, or cause to be erected and maintained, a good and substantial fence, as required by law, or any fence whatever, on either or both sides of said railroad, throughout the entire length of said road.

That throughout the entire length of said railroad there was during all of said time no fence whatever erected or maintained on either or both sides of its said track to separate said railroad from adjoining land and country.

V.

That on or about the 13th day of June, 1893, said Jose De Nobra was received by said defendant as a passenger aboard of one of the trains of cars of said defendant, at or near the terminus of said railroad, in the redwoods in said Mendocino county, to be by

said defendant carried and transported over its said railroad to its terminus, at or near said Albion river. That after said Jose De Nobra had been received aboard of said train of cars, as aforesaid, said cars, drawn by a locomotive of said defendant's, started to transport and carry said Jose De Nobra as a passenger along and over said railroad to its terminus at or near said Albion river.

That plaintiff is informed, and believes, and on her information and belief alleges: That the agents and employees of said defendant, who were in control and management of said locomotive and cars at said time, were careless, heedless, negligent, reckless and wholly unfit and incompetent to manage or run said locomotive and cars over or along said road, which fact was well known to said defendant.

And plaintiff further alleges, that when said Jose De Nobra was by said defendant being carried and transported over and along its said road as aforesaid, that said locomotive and train of cars of said defendant, in the charge of and under the control and management of said defendant, its servants, agents and employees, were carelessly and negligently run and managed, and were run at a dangerous and reckless rate of speed, over and along said railroad, to-wit: at a rate of speed of more than thirty miles an hour; that while said train of cars were being run over and along said railroad, as aforesaid, with said Jose De Nobra as a passenger thereon, said cars were thrown with great violence from the track of said railroad, bruising and wounding said Jose De Nobra, and instantly killing him, the said Jose De Nobra.

That by reason of the failure of said defendant to erect and maintain a good and substantial fence on each side of its said railroad, as aforesaid, and by reason of the failure of said defendant to employ prudent, careful and skillful employees, servants and agents, to manage and run its locomotives, cars and trains over its said railroad, as aforesaid, and by reason of the careless, heedless, reckless and dangerous manner in which said train of cars was run over and along said railroad, as aforesaid, said Jose De Nobra was wounded, bruised and killed.

VI.

That said Jose De Nobra, at the time of his death, left him surviving, this plaintiff, his widow, and three minor children, of the ages of two (2) years, five (5) years, and thirteen (13) years, respectively. That this plaintiff and said minor children were mainly dependent upon said husband and father for their support. That said Jose De Nobra, at the time of his death was an industrious, able-bodied man, and was capable of earning sixty ($60) dollars per month. That said Jose De Nobra was a devoted and affectionate husband, and a kind and loving father; that by reason of his death, as aforesaid, this plaintiff has been deprived of the society, sympathy, advice, care and support of her said husband, and his said children have been deprived of the fatherly love, care and support of their said father. That said Jose De Nobra was of the age of about 49 years at the time of his death.

VII.

That by reason of the death of said Jose De Nobra, as aforesaid, said plaintiff and said minor children of said plaintiff and of said Jose De Nobra have been damaged in the sum of fifty thousand ($50,000) dollars, and no part of the same has been paid.

Wherefore, plaintiff demands judgment against said defendant for the sum of fifty thousand ($50,000) dollars, and costs of suit.

A. B. HUNT,
Plaintiff's Attorney.

STATE OF CALIFORNIA, }
County of Alameda. } ss.

Maria De Nobra, administratrix of the estate of Jose De Nobra, deceased, being duly sworn, deposes and says: That she is the plaintiff in the above-entitled action; that she has heard read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to those matters which are therein stated on her information or belief, and as to those matters, that she believes it to be true.

her
MARIA X DE NOBRA.
mark

Witness to signature of Maria de Nobra.
M. STONE.

Subscribed and sworn to before me, this 19th day of May, 1894.

(Notarial Seal.) E. O. CROSBY,
Notary Public, Alameda, Co.

[Endorsed]: Filed May 19th, 1894. W. J. Costigan, Clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Northern District of California.

MARIA DE NOBRA, the Administratrix of the Estate of Jose de Nobra, Deceased, Plaintiff, vs. ALBION LUMBER COMPANY, (a Corporation), Defendant.	Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court, in the City and County of San Francisco.

Summons.

To the President of the United States of America, greeting: To the Albion Lumber Company (a corporation), defendant.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the City and County of San Francisco within ten

days after the service on you of this summons, if served in this county, or if served out of this county, then within thirty days, or judgment by default will be taken against you.

The said action is brought to recover from said defendant the sum of fifty thousand ($50,000) dollars damages, which plaintiff alleges that she as administratrix of the estate and representative of the heirs of Jose De Nobra, deceased, has sustained by reason of the death of said Jose De Nobra, caused by the negligence of said defendant, its servants and employees, on or about June 13th, 1893, as by reference to the complaint herein will more fully appear, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the Court for the relief in said complaint demanded.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the (Seal.) United States, this 19th day of May in the year of our Lord one thousand eight hundred and ninety-four and of our Independence the 118th.

W. J. COSTIGAN,
Clerk.

[Endorsed]: United States Marshal's Office. Northern District of California.

I hereby certify that I received the within writ on the 19th day of May, 1894, and personally served the same on the Albion Lumber Company (a corporation), on the 19th day of May, 1894, by delivering to, and

leaving with George G. Wilcox, president of the above-named Albion Lumber Company (a corporation), defendant named therein, personally, at the County of San Francisco, in the said district, a certified copy thereof, together with a copy of the complaint, certified to by A. B. Hunt, plaintiff's attorney, attached thereto.

W. G. LONG, U. S. Marshal.
By J. T. Grey, Deputy.

San Francisco, May 21, 1894.
Filed May 21st, 1894. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, and Northern District of California.

MARIA DE NOBRA, as the Administratrix of the Estate of Jose De Nobra, Deceased,
Plaintiff,
vs.
ALBION LUMBER COMPANY (a Corporation),
Defendant.

Affidavit of Service of Answer.

STATE OF CALIFORNIA,
City and County of San Francisco.

Charles D. Houghton, being duly sworn, says: That he now is, and at all the times herein mentioned was over the age of twenty-one years; that on the 21st day of June, 1894, he personally served the annexed

answer upon A. B. Hunt, attorney for the plaintiff in said action, between the hours of 9:00 A. M. and 4:00 P. M. of said day, by delivering to and leaving with the person in charge of the office of said Hunt a copy thereof; that at said time said Hunt was absent from his said office.

Subscribed and sworn to before me this 21st day of June, 1894.

CHARLES D. HOUGHTON,
GEO. T. KNOX,
Notary Public.

(Notarial Seal.)

In the Circuit Court of the United States, Ninth Circuit, and Northern District of California.

MARIA DE NOBRA, as the Administratrix of the Estate of Jose De Nobra, Deceased, Plaintiff, vs. ALBION LUMBER COMPANY (a Corporation), Defendant.	At Law. Number 11,913.

Answer.

Now comes the defendant, and for answer to plaintiff's compaint herein, alleges: That it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph 1 of said complaint, and for that reason and upon that ground:

Denies—That plaintiff is now or always has been, or ever was, an alien to the Government of the United States, or that she is a native of the Kingdom of Por-

tugal, or is now, or always has been, or ever was, a subject of the King of Portugal, and for the same reason and upon the same ground.

Denies—That said Jose De Nobra at the time of his death was, always had been, or ever was, an alien to the Government of the United States, or a native of the Kingdom of Portugal, or that during his whole lifetime he was, or ever was a subject of the King of Portugal.

And for the same reason and upon the same ground this defendant

Denies—That the subject of this action is a controversy between an alien to the Government of the United States, and a citizen of the State of California.

This defendant denies that the defendant during all the dates and times mentioned in said complaint, or ever, or at all was engaged in managing or operating the said "Albion River Railroad," or any railroad, its roadbed, tracks, cars, locomotives or appurtenances belonging to said road, or any railroad, for the purpose of carrying passengers on or over said roadbed; or for moving freight on or over said road or roadbed, other than the logs and lumber of this defendant.

Denies—That at all the times mentioned in said complaint, or at any time prior thereto, said defendant wholly failed or neglected, or failed or neglected to erect or maintain, or cause to be erected or maintained a good or substantial fence, as required by law, and denies that this defendant ever was required by law to fence its said railroad.

Denies—That on or about the 13th day of June, 1893, or at any other time, said Jose De Nobra was received by this defendant as a passenger on board of one of the trains of cars of said defendant, or any train of cars, at or near the terminus of the said railroad in the redwoods of said Mendocino county or elsewhere, to be by this defendant carried or transported over its said railroad, or any railroad, to its terminus, at or near said Albion river, or elsewhere, or at all.

Denies—That after the said Jose De Nobra had been received as a passenger aboard said train of cars or any train of cars, or at any time said cars drawn by a locomotive of this defendant, or otherwise, started to transport or carry said Jose De Nobra as a passenger along or over said railroad, to its terminus at or near said Albion river, or elsewhere; and

Denies—That the defendant on said 13th day of June, 1893, or at any other time, or ever, or at all, received said Jose De Nobra as a passenger upon its said train of cars, or any train of cars owned, controlled or operated by this defendant.

Denies—That the agents, servants, or employees of this defendant who were in control or management of said locomotive or cars, or any cars or locomotive of this defendant at said time, or at any time, or ever were careless, or heedless or negligent, or reckless, or unfit, or incompetent, to manage or run said locomotive or cars over or along said road, or any road.

Denies—That when said Jose De Nobra was by this defendant being carried or transported over or along its railroad, or any railroad, said locomotive or train of cars of this defendant, in the charge, or under the con-

trol or management of this defendant, or its servants, or agents, or employees, or otherwise, were carelessly or negligently run or managed, or were run at a dangerous or reckless rate of speed over or along said railroad, or that said cars were run at a rate of speed of more than 30 miles an hour, or at any rate of speed greater than ten (10) miles an hour.

Denies—That while said train of cars were being run over or along said railroad with said Jose De Nobra as a passenger thereon, said cars were thrown with great violence, or at all from the track of said railroad, bruising or wounding said Jose De Nobra, or killing him.

Denies—That by reason of the failure of this defendant to erect or maintain a good or substantial fence, or any fence, on each or either side of its railroad, or by reason of the failure of said defendant to employ prudent or careful or skillful employees or servants or agents to manage or run its locomotives or cars or trains over its said railroad, or that by reason of the careless, or heedless, or reckless, or dangerous manner in which said train of cars, or any train of cars, was run over or along said railroad, said Jose De Nobra was wounded, or bruised or killed.

And this defendant further alleges, that it has no information or belief sufficient to enable it to answer the allegations contained in Paragraph VI of said complaint, and for that reason and upon that ground, this defendant,

Denies—That said Jose De Nobra at the time of his death left him surviving the plaintiff, his widow, or three, or any minor children; or that plaintiff or

said minor children were mainly dependent, or at all dependent, upon said husband and father, the said Jose De Nobra, for support; or that said Jose De Nobra at the time of his death was an industrious or able-bodied man, or was capable of earning $60.00 per month, or any sum greater than $30.00 per month: or that said Jose De Nobra was a devoted or affectionate husband, or a kind or loving father, or that by reason of his death the plaintiff has been deprived of the society, or sympathy, or advice, or care, or support of her said husband; or that his said children have been deprived of the fatherly love, or care, or support of their said father; and

Denies—That by reason of the death of said Jose De Nobra, plaintiff, or said minor children of plaintiff, and said Jose De Nobra have been damaged in the sum of fifty thousand dollars, or in any other sum, or at all.

And for further answer to said complaint, and for a separate defense to said action, this defendant alleges:

That the death of plaintiff's intestate, Jose De Nobra, alleged in said complaint, was caused by the wrongful acts and careless and negligent conduct of said Jose De Nobra, and without any fault of this defendant, or its agents or employees, and that the facts and circumstances under which said Jose De Nobra was killed, are as follows, to-wit:

That on the said 13th day of June, A. D. 1893, and for a long time prior thereto, this defendant was, ever since has been, and now is engaged in the manufacture of lumber from trees growing and being upon the

lands owned by this defendant, and tributary to the Albion river, in Mendocino county, State of California, and during all said times this defendant has owned, controlled, and operated a sawmill and other machinery, situated at or near the mouth of said Albion river, used for the purpose of sawing logs into merchantable lumber; and also during the times aforesaid, has owned, controlled, and maintained, at or near the mouth of said river, a wharf for the purpose of shipping the lumber manufactured at said mill, and other products of the forest; and also during the times aforesaid has owned, and now owns, a large tract of land, known as timbered land, lying on both sides of said Albion river, extending from, at or near the mouth of said Albion river, up and along said river for a distance of nine miles.

That in connection with said mill, wharf, and shipping point, the defendant and its predecessors had, prior to said 13th day of June, 1893, constructed a railroad over and upon a portion of its said land, commencing at a point on said river, distant about two and one-half miles easterly from said mill and extending thence easterly up and along said river for a distance of about eight miles, for the purpose of transporting mill logs over said lands to the aforesaid point on said river at which point said logs are put into said river and from thence floated or driven down said river to said mill.

That said railroad is and was, on said 13th day of June, A. D. 1893, equipped with a locomotive, and with what are known as "logging-cars," but no cars or other vehicles for the transportation of passengers or freight

other than said logs and the lumber of this defendant were, on said 13th day of June, 1893, or have ever been, provided or used upon said railroad by this defendant, or its predecessors.

That said railroad lies entirely over and upon the aforesaid lands of this defendant, and has never at any time been used or operated by this defendant or its predecessors for the common carriage of passengers, or freight, but has been used and operated solely and exclusively for the purpose of transporting the logs and lumber of this defendant to the aforesaid point on said Albion river, to-wit: the westerly terminus of said railroad.

That on or about the 13th day of June, A. D. 1893, the plaintiff's intestate, Jose De Nobra, without the permission or consent of this defendant, or its agents or employees, and without any right so to do, and wrongfully, went upon the aforesaid lands of this defendant, in said Mendocino county, at or near the easterly terminus of said railroad; that at said time this defendant had loaded upon its train of logging cars at or near said terminus, a load of mill logs for transportation over and upon its said road to the aforesaid point on said Albion river.

That plaintiff's said intestate, Jose De Nobra, without permission or consent of this defendant, or of its agents, or employees, and without any right so to do, and carelessly, negligently and wrongfully got upon said load of logs with the intention, as this defendant is informed and believes, of riding upon said logs and upon said train of cars from said easterly terminus of said railroad to the westerly terminus thereof.

That said locomotive and train of cars laden with mill logs, as aforesaid, with plaintiff's said intestate, Jose De Nobra, riding upon said load of logs, proceeded upon its journey to said westerly terminus of said railroad, and while thus proceeding met with an accident by which the car containing the load of logs upon which the plaintiff's said intestate was riding, was thrown from the track and rails and down an embankment, and the said Jose De Nobra thereby received the injury which caused his death.

That at the time of said accident said locomotive and train of cars were in the charge of competent and skillful agents and employees of this defendant, and said accident and the injury to plaintiff's said intestate aforesaid, occurred without the neglect or fault of this defendant, or of either or any of its agents or employees, and was unavoidable.

Wherefore, this defendant prays to be hence dismissed with its costs.

CHAS. E. WILSON,
Attorney for Defendant.

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

Miles Standish being duly sworn, deposes and says:

That he is Secretary of the Albion Lumber Company (a corporation), by virtue of the laws of the State of California, the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on defendant's information or belief, and as to those matters, that he believes it to be true.

MILES STANDISH.

Subscribed and sworn to before me this 19th day of June, 1894.

(Notarial Seal.) LINCOLN SONNTAG.

Notary Public in and for the City and County of San Francisco, State of California.

I, Charles E. Wilson, counsel for defendant, in the above-entitled action, do hereby certify that in my opinion the foregoing answer is well founded in point of law.

CHARLES E. WILSON,
Counsel for Defendant.

June 20, 1894.

[Endorsed]: Filed June 21st, 1894. W. J. Costigan, Clerk.

In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California.

MARIA DE NOBRA, as the Administratrix of the Estate of Jose De Nobra, Deceased, Plaintiff, vs. ALBION LUMBER COMPANY, (a Corporation), Defendant.	No. 11,913.

Verdict.

We, the jury, find in favor of the plaintiff and assess the damages at the sum of $2000, two thousand dollars.

H. P. SMITH,
Foreman.

[Endorsed]: Filed January 11th, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

UNITED STATES OF AMERICA.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

MARIA DE NOBRA, as the Administratrix of the Estate of Jose De Nobra, Deceased, Plaintiff, vs. ALBION LUMBER COMPANY (a Corporation), Defendant.	No. 11,913.

Judgment.

This cause come on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly empaneled and sworn to try said cause. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, arguments of counsel and instructions of the Court, the jury retired to deliberate upon a verdict, and subsequently returned into court, and being called, all answered to their names, and presented the following verdict:

"We, the Jury find in favor of the plaintiff, and assess the damages at the sum of ($2000), two thousand dollars. H. P. Smith, Foremen."

Wherefore, by virtue of the law, and by reason of he premises aforesaid, it is ordered, adjudged and

decreed, that said Maria De Nobra, as the Administratrix of the estate of Jose De Nobra, deceased, have and recover from said Albion Lumber Company (a corporation), the sum of two thousand dollars together with the said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $145.20.

Entered this 30th day of January, A. D. 1895.

W. J. COSTIGAN,
Clerk.

A true copy, attest:

W. J. COSTIGAN,
(Seal.) Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

MARIA DE NOBRA, Admx., etc,
Plaintiff,
vs. No. 11,913.
ALBION LUMBER COMPANY,
Defendant.

Certificate to Judgment Roll.

I, W. J. Costigan, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 30th day of January, 1895.

(Seal.) W. J. COSTIGAN,
Clerk.

[Endorsed]: Judgment Roll. Filed Jan'y 30th, 1895. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, and Northern District of California.

MARIA DE NOBRA, as the Administratrix of the Estate of Jose De Nobra, Deceased, Plaintiff, vs. ALBION LUMBER COMPANY, (a Corporation), Defendant.	No. 11,913.

Notice of Motion for a New Trial.

To the plaintiff, and A. B. Hunt, Esq., her attorney:

You will please take notice that the defendant intends to move this Court to vacate and set aside the verdict of the jury in the above-entitled action, and to grant a new trial herein upon the following grounds, to-wit:

I.

Accident and surprise which ordinary prudence could not have guarded against.

II.

Newly discovered evidence material for the defendant, and which defendant could not with reasonable diligence have discovered and produced at the trial.

III.

Insufficiency of the evidence to justify the verdict, and that the verdict is against law.

IV.

Error in law occurring at the trial and excepted to by the defendant.

Said motion will be made upon affidavits to be hereafter filed, and upon a statement of the case to be hereafter prepared and settled.

Dated January 19, 1895.

CHARLES E. WILSON,
Attorney for Defendant:

Due service of the foregoing notice and receipt of copy thereof, hereby admitted this 21st day of January, 1895.

A. B. HUNT,
Attorney for Plaintiff.

[Endorsed]: Filed January 21, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Dep. Clerk.

In the Circuit Court of the United States, Ninth Circuit, and Northern District of California.

MARIA DE NOBRA, Administratrix of the Estate of Jose De Nobra, Deceased,
Plaintiff,
vs.
ALBION LUMBER COMPANY, (a Corporation),
Defendant.

Defendant's Statement on Motion for New Trial.

The defendant proposes the following as its statement on motion for a new trial, to-wit:

This cause came on for trial on the 9th day of January, A. D. 1895, before a jury regularly empaneled and sworn. A. B. Hunt and —— Lemon appearing for plaintiff, and Charles E. Wilson, and Warren Olney appearing for defendant. And the following proceedings were had:

Lucia Ferrea Silva, called for plaintiff testified as follows:

Knew Jose De Nobra in his life-time. On or about the 2nd day of June, 1893, I was at the town of Big River and saw De Nobra there. I can't say what the day was exactly—know he arrived on a Saturday. Augusto Ferreira De Silva, Manuel Fernandez, Jose De Nobra, Antonie Correia, and John Vieria were with him. They got there in the afternoon, and stayed there until the next morning at 6 or 7 o'clock.

We then went to Meyer's camp. They remained there three or four hours, and went further; told me they were going to Albion. I stayed at Meyer's camp. Next saw De Nobra at 7 o'clock on the day that he was killed.

John Vieria, called for the plaintiff, testified as follows:

I live at Oakland. Knew Jose De Nobra in his lifetime. Was in Mendocino about the 12th or 13th of June, 1893. Went there from Oakland. De Nobra, Correia, Augusto Silva and Manuel Fernandez went with me. Went by steamer from San Francisco to Big River. We remained at Big River one day, then went to Meyer's camp; stayed about two hours, then came back to Big River. From Big River we went to Albion river. We got on the train at the tank—myself, Silva, de Nobra, Correia and Fernandez, and we rode about nine or ten miles up the road to the upper tank, where we saw Mr. Hickey; he was superintendent of the camp. Asked him if he had any work to give us, and he said yes; I got job. He asked for blankets in the first place, and I told him I got my blankets, and this man alongside of me, Silva. The other three men did not have their blankets—were at the Big River hotel He said, well let them three men go and get their blankets out of Big River and get on the train; get on the cars and go down boom and go and get blankets and come up next day and start in to work. That he would give me and Silva work the next day, and for the other three men to get on the train and go down the boom and get their blan-

kets and come back and he would give them work. He told us to go to the camp and get something to eat. We went and got something to eat and then Correia and De Nobra got on the train. I was there at that time. They were in good condition of health and sound and able-bodied men. They left on the train about five or half-past five o'clock. The next time I saw Correia and De Nobra, they were dead.

On cross-examination, the witness testified:

Got to Albion Camp on the 13th of June—Tuesday. We went on the trail to the tank; did not find any station there; the train stopped for water, and I got on—got on logging cars. I got up to the logging camp about half-past one. Mr. Hickey was up to the end of the road, alongside of his shanty. The shanty was about ten or fifteen feet from the railroad. I saw him afterwards that day down where the men got killed. Did not see him again until I saw him with the men that got killed. I saw De Nobra and Correia get on the train; that was about two or two and one-half miles below Hickey's shanty. The men got on the train at the same place where I got something to eat. They got on logging cars. Car was loaded up with logs. They got on top of the logs. There were other cars in the train—all loaded with logs. Saw two ladies on the train. They were on the engineer and fireman's seats. Saw the engineer and the brakeman. The train stopped four or five minutes—just enough to take some water, and while the train was taking water, De Nobra and Correia climbed on the load of logs. The car that De Nobra and Correia climbed on was about the middle of the train. An Italian climbed

up on the logs at the same time. There was a pretty good load on the cars—small and big logs—a big pile, piled up on top of one another. On the car that these men were on the logs were piled up high. I worked at the camp 40 or 45 days after this. I saw no accommodation for passengers on the train, except seats in the engine. There was no caboose or box car.

Plaintiff here introduced and read in evidence the deposition of Henry B. Hickey, taken under a stipulation of parties at Mendocino county, California, on the 28th day of August, 1894, in which said Hickey testified as follows:

"My name is Henry B. Hickey. My age is thirty-five years; residence, Albion, Mendocino county, and my occupation is superintendent of the Albion Lumber Company's woods and logging railroad. I have been in the employ of the defendant two and one-half years, and from November, 1891. On the 13th day of June, 1893, I was in and about the lumber camps at the end of the railroad in the redwoods. I have no recollection of seeing Mr. Briggs in the lumber camp that day. He may have been there. I was at the scene of the railroad wreck on that day after the wreck occurred."

Q. Was there any Portuguese in the camp that day with whom you had any conversation, and before the time of the wreck?

A. I could not state positively that.

Q. Please state your best recollection.

A. As to that particular day I cannot positively say. The Albion Lumber Company employed a great

many men at that time, and I cannot call to recollection any particular men except those who at that time were directly in the employment of the company. There might or might not have been strangers there which I could not recollect, nor would I now recollect whether I had a conversation with strangers on that day or not.

Q. Do you remember whether you were at the train when it left camp in the redwoods on June 13th, 1893, about night, to go down to the boom, and just before the time of the wreck; I mean by the train, the train that was wrecked? Please state your best recollection on this point?

A. I know I was not there to go down on the train, and I don't think I was at the switch when the train left.

P. C. Briggs, witness for the plaintiff, testified as follows:

Reside in Mendocino county. Have resided there something like 18 years. Am what might be called a timberman. Know the Albion railroad; known it ever since it was built—four to seven years. Reside three or four miles from the lower end of the road—the boom. Have traveled on that road. Know of freight having been hauled on that road. It consisted of hay, grain and supplies for the camp going up, and ties coming down. Those were hauled for Mr Myers. It was common practice for everybody to ride up and down the road. I never heard of any objections being made by the defendant. I have rode up and down the road perhaps a dozen times; no fare was ever de-

manded from me, or anybody else so far as I know. Never heard of such a thing. I went over that road on the 13th of June, 1893, the day of the accident; got on at the lower tank, about eleven o'clock or after in the forenoon. Saw the men that were killed and several others get on at the same time. I went up to the switch, then footed it up to the cook-house. Met all of these men there. Saw Mr. Hickey there. I had a talk with him in relation to a job of work. He inquired what I wanted to do, and I told him I was subject to orders to do most anything, though I stated what kind of a job I wanted. He told me that those places were all taken, and said: "I want men on the lower track building the roadbed." I made arrangements with him to work. I stayed there until the cars came up. They started to go back just a quarter to six. Some three men besides myself got aboard the train. There were these men that were killed, and a man I found to be an Italian. Conductor and the brakeman were on the train. Cortez, conductor, and Pettit, brakeman. I got on the front end of the second car from the engine. These cars are logging trucks. It takes two trucks to constitute a loaded car, and if the logs are long, these trucks are separate, of course, with a coupling between; and, in coupling, if the logs are short the coupling is shorter. Two sets of these trucks constitute a loaded car. A truck is two sets of wheels, two wheels to each set, four wheels to each truck, a platform about eight feet square; in the center of the platform a bolster, and the logs are put on. These trucks are separated far enough for the logs to go on, coupled together. The logs are put

on and chained over; that constitutes a loaded car. I was standing on the platform of the front truck of the second car. Platform is something like ten feet square, and on the truck I was standing was a log extending clear across. The other log left a space of about a foot, and I thought it was a very nice place to stand, and I stood there with my back facing the engine. Correia and De Nobra got on the third car. They were on the logs—could not say whether they were on the middle of the logs or the end—they were on the load of logs. The engineer and fireman were on the engine. I know there was some ladies came off of it. Pettit was on the car that the Portuguese were on. He was standing on the third car on the logs. The other men were sitting down. Don't know whether Cortez was there when the Portuguese got aboard the cars. The cars were there, and we all went down and got on. I mean myself and the others that went down; there was quite a number of us went down to the switch-track from the cook-house where the loaded cars were, and waited for the engine to come down. Prior to the engine hitching to the loaded cars they had some switching to do to get the empties back to the log ways up at the cook-house. There was two log ways, and after backing the loaded cars up here, they would run the empties up on the switch-track, and when they were done they were ready to go, and in the meantime we got on, so as to be ready to go down when the train went down. The Italian and Portuguese and myself were on the car when the engine came down. Brakeman came down with the engine, I think. He was with the train when

we left there. I don't know that he had any conversation with the Portuguese. I don't know that I heard any conversation between him and them at all. When we started, Mr. Cortez was on the same car that I was. The train started off at a pretty lively rate of speed, ran down to the upper tank, stopped a little above the switch, unhitched and went down for water, then came back to the switch-track, then coupled up and started down. They started up lively, running perhaps half a mile at a pretty good rate, and then slowed up a little, just for a moment, and then started up livelier than ever.

Q. At what rate of speed did they run when they started it livelier than ever?

Q. I will ask him as to his knowledge of the running of trains. Mr. Briggs, state to the Court what experience you have had as to the running of trains, at the rate of speed which they run per mile, or have run—of any kind of trains first, and then logging trains—what observation have you had?

A. I have traveled on the Salmon Creek road and timed the speed.

Q. Of a logging lrain?

A. Of a logging train, from one end of that road to the other, several times.

Witness further testified: I timed the speed of that train severel times. That train ran at about the rate of 8 miles an hour. I have had some travel on the Fort Bragg road and the Albion. I have rode on the Fort Bragg road for six or seven months, perhaps on an average of twice a week, and timed the train quite a number of times—perhaps 3 or 4—4 or 5

times at least. Fort Bragg road is a logging road; that train run all the way from 8 to 10 miles an hour. Don't know that I ever timed the speed of the Albion particularly at any time. Used to time the Salmon Creek road very often. Sometimes I have traveled on the Salmon Creek road every day during the week, and at other times I would not for two or three weeks. I think that road was built in 1876 or 1877; I have rode on it ever since—ride on it now occasionally.

Q. (By Mr. Hunt)—Now, I renew my question. At what speed in your judgment was the train running after you left the second tank, per hour?

Mr. Olney—Let me ask him a question or two.

In answer to Mr. Olney, the witness testified:

The grade on the Salmon Creek road is not a uniform grade, it is up and down. Runs slower in some places than in others. I have timed the train coming down the Salmon Creek road; I have went down in an hour—they call it eight miles. Don't know that I ever made the trip inside of an hour unless it was a very few minutes. Don't know as I ever noticed much difference in the running of trains; sometimes it was a little faster than others—that is, they went from the upper end down clear through without making a stop. The Fort Bragg is very good grade for a logging road, I believe. Don't know at what rate of speed they run on that road. They vary a great deal on the Albion road. I have never ridden on that road when they went so fast as they did on this occasion.

Q. We are talking about other times. We want to find out what your ability is to judge of the rate of speed of a logging railroad. What was the rate of speed?

A. Well, I don't know as I would be able to answer. I have ridden up and down a good many times. Can't say I have ridden a great many times. Don't know that ever had occasion to time it. Did on the Fort Bragg road.

Q. (By Mr. Hunt)—I will have to go back a little. From the time you left the upper tank, please tell the jury how it ran with regard to its rate of speed, when you first started, and then until the time of the wrecking?

A. When we first started from this upper tank, we started pretty lively—what I should call at a rate of something like 8 or 10 miles an hour for the first half mile, then they checked up a little, then they started off, and then it went faster and faster from that time on, and they went, you might say, like the wind.

Witness further testified: Right at the time of the wreck, I estimate the speed to least 30 miles an hour or over. Objects right near the track went by sz! sz! sz!—slipped by, and you could not see them scarcely. A majority of the time after we left the upper tank I could not see the engine half the time, owing to smoke and steam from the engine. I was thinking about getting off—made up my mind that it was no place for me. I was standing on the platform, where I first stood, all the time. I did not jump off, because there was no place in the world that I could jump that presented itself. There was a high bank. After we crossed the bridge here, I felt a sudden jar like a chunk, and I naturally threw my eyes around to see what was the matter, and at the same time holding on with both hands to keep from falling off

or being shaken off, and I saw a log bounding up from the ground, or up from the bank towards the car, and also discovered that the car was off the track. I felt jarred. I either felt or saw it at least three times —chunk—just like the end of a log would slip off the front part of the wagon or truck, and it struck something solid. I motioned the engineer to stop, but I presume they felt the jar and stopped, without reference to my motion. Stopped as soon as they could, I presume—run something like 150 or 200 yards and stopped. The car that I was on and the one in front of me, and the engine were all on the track. When the car stopped, I got off, went back to see what the result was, and I met Mr. Cortez and an Italian leading Mr. Pettit around the end of those logs on the hind truck of the third car. I discovered at the same time a man catched between these logs that were on this car hanging there between those logs, with his head down near the ground. I saw the car on which the Portuguese had taken their seats—the hind truck of the third car. We got jackscrews and took him out. He lived anywheres from 10 to 15 minutes, perhaps. After this man was taken out and laid down, I got up on my feet and walked the track to see if there were any others injured, and I discovered a man laying back between the track and the bank dead. He was one of the Portuguese. Pettit was laying on the ground near where we took the man from between the logs. The engine and two cars had not left the track. There must have been, plagued if I know, something like 150 yards, I guess, from the forward truck of the third car, attached to the hind truck of

the third car. The trucks of the third car which the Portuguese were on separated. The space where they separated was something like a 100 or 150, might have been 200 yards, I don't know. I did not take any particular notice of the distance, quite a little space. The logs were attached to the back truck, laying crossways of the truck or crossways of the road. I think there were three cars wrecked in the center of the train. The cars at the hind end of the train were still on the track. I left the upper end of the road on the train a quarter of six, know it because I looked at my watch. The fireman went down to where the engine was and blew the whistle, uncoupled and went off. He was gone but a short time, can't state how long, 10, 15 or 20 minutes, perhaps. I was busy all the time when he was gone. When he came back I started up the trail to Mr. Pettit's house. Went perhaps half a mile, picked my way through the woods, very steep ground. Went up something about half way and I heard the Albion whistle, looked at my watch and saw it had just been three-quarters of an hour since we left the switch at the upper end of the road. The distance from where we got aboard the train down to the point of the accident must have been something like two miles or over, anywhere from two to three miles. From the place of the accident to the boom was perhaps five miles, perhaps a little more, something like that at least.

On cross-examination the witness testified:

After the train started from the tank they went pretty lively for something like half a mile, and then checked up a little; they checked up for the cut, then

they started it again and ran to the place of the accident, continually on the increase of speed; that was the only check that there was from the time they left the place where they checked up a little, to the accident. They must have been running a mile or a mile and a half from the time they checked up until the accident. I should take it to be something like two miles from the tank to where the accident occurred. I think they were running at the time of the accident at least 30 miles an hour, or faster. I should not think they were running over five or six miles after they left the tank until they checked up; should not think there was a slight upgrade from the tank to the bridge across the creek. It is down hill—down the river. There is a cut somewhere, but where it is I could not tell you. I don't know that I ever passed up and down that road but what they checked up a good many times going down. There was more than 4000 feet between the tank and where the accident occurred; I am certain of that. I am pretty certain about the time, because I had occasion to note the time. If the engineer and fireman and Mr. Cortez and those young ladies and everybody that was connected with that train but myself should say that they were running at a slow rate of speed, I would not believe a single word of it.

On re-direct examination the witness testified:

In my judgment they ran one-fourth the distance, checked up, and then run on an increased rate of speed three-fourths until the wreck.

Maria De Nobra, plaintiff, called and testified as follows:

I am the plaintiff in this action. Was born at the Island of Madera, in the Kingdom of Portugal. Came to California four years on the 10th of next February. My husband, Jose De Nobra, was born in Madera also. Neither myself nor my husband was ever a naturalized citizen of the United States. Neither of us was ever in America until we came here four years ago. The deceased was my husband. He was aged about 40 at the time of his death. At that time we had three children, aged respectively 12, 3½, and not quite a year. I have no one to earn anything for my support. I have a small allowance of three dollars, that they allow me by the county. My husband was working in the coal yard and got $2.50 a day. He was a sober, industrious man. Devoted his earnings to our expenses. He used to bring the money home and give it to me for the support of myself and children. We lived happily together. He was kind and devoted to his children. The last time I saw him was when he went away on the "San Juan," on June 10th. Never saw him since—dead or alive.

On cross-examination, the witness testified:

He was out of work at the time he left here for Mendocino county. He had been out of work for about two months.

Plaintiff here rested her case.

Miles Standish, called as a witness for the defendant, testified as follows:

Am General Manager of the Albion Lumber Company. Carries on lumber business; have a railroad in connection with the business, used for transporting logs and split timber for the Albion Lumber Company. That is the general business of the road, and what it was built for; it runs entirely over our own land. The defendants has never held itself out to the public that it would carry freight or passengers. We have carried people up and down on the trains—that is, they have gotten on the train. No one ever had any authority from the company to permit people to ride upon the trains, we do not like to carry people on these trains; still there were men going up and down, and it was pretty hard to keep them off at times. We discouraged it all we could. We charged no fare, and it is pretty hard with camps in the woods to throw men off the train when they are going back and forth. I have been connected with this railroad about three years. Had experience in the East. Have been engaged in the business about twelve years. This railroad is constructed for the sole purpose of carrying logs and timber. We run logging cars that were built for the express purpose of carrying logs. Part of them we have with platforms about seven feet square, and the platforms are boarded over in order that in unloading the cars the jacks which are used to unload could get a hold on the platform to shove the logs off of the cars. We purchased other cars which had no platforms; so we were running two different kinds of cars, all built for logging entirely. We

had no cars intended for people or persons to ride upon. Every year we have to pick up a good many logs along the track that have tumbled off the cars. The logs are loaded as well as we can—we try to balance them on what is termed the bunk, which sways back and forth. We haul all lengths of logs from 10 to 30 feet; and sometimes the ends of the logs of one car are liable to jar into the ends of the logs of another car. And these bunks are made to sway back and forth so that cars will carry them easier, and so that the wheels won't bind going around sharp curves. It is not possible, in my opinion, to bind the logs so as to always prevent them from getting loose. We use chains and do the best we can, but a sudden jerk or lurch, the logs are liable to let go and get off the car. There is no place, in my opinion, on a logging train where a man can ride with safety, except in the engine. I think the rear of the train would be much safer than the middle. I think experience has shown that. During all of the last twelve years I have had charge of a lumber company—here and in the East—and during that period we were freighting logs at all times by rail. It was my business to go up in the camps and ride back and forth on these trains —or regular train, anyway I could get back and forth between the mills and the camps; and on the Albion river it was the only way, unless we walked, by riding on these logging trains. There is a seat for the fireman and a seat for the engineer on the locomotive. It is unsafe, very unsafe, for people to ride on these cars. Mr. Hickey did not have any authority to permit people to ride, or invite people to ride on the cars

of the company. He had charge of that logging road, and of the camps; and I think under that charge if he gave them a personal right we should call him to account for it, rather than the people. He had no authority to do that from the company, and if he did it I would call him to account for it.

On cross-examination witness testified:

At the time of the accident we called the length of the road seven miles. I suppose there was eleven, all told, including branches. We never made a measurement. There was no way of getting up and down those seven miles except by riding on the trains or walking. There was no wagon road. A great many of our employees, those coming from Mendocino, went across the country, and there was a wagon road to the river, about half way up. Some of our employees rode from the boom up to the end of the railroad, and some did not. I have seen lots of men packing their blankets up their; could not see as to whether they were in the employ of the Company. It is not a fact that everybody who had been employed and was working for the Company went up and down these cars. I think it was well known that we did not want people riding on the cars. I don't think they rode generally; I would not like to say definitely. We aim to run four trains a day; somestimes it varied, depending on the emergencies of the logging. People who rode up and down on the railroad as a rule, rode on the logging cars; sometimes a person would ride on the engine by special permission of the engineer; without that permission they rode on the logging cars, if at all. Those who rode on the train had to

ride on the logging cars; there was no other place provided for them to ride. Don't think it was a fact that almost every train that went up and came down over the road carried persons who were riding upon logging cars. There was no other place for the brakeman and conductor, or anybody else to ride, except on the logging cars. No one except Mr. Hickey had anything to do with the logging railroad. Mr. Hickey employed the men that were employed in the redwoods. From June 13, 1892, to June 13, 1893, I presume I went over that road probably two or three times a week, and at other times I would not go up there for two weeks. Generally went on the train; sometimes rode on the logging cars, but generally on the locomotive. I do not think that I ever rode on the loaded cars. I think going up when the cars were empty, we used sometimes to get on the logging cars. I don't think I ever came down on a load of logs; would not say I did not. I have seen people ride on those cars, not in the employ of the company; but not every time that I have been up there. Could not say that I have seen them frequently—I have seen them sometimes. I don't recall any instance of their being on loads coming down. I may have seen them; would not say that I did not. We never demanded fare of anybody. I have seen people going on the trains and going up in the woods on those cars. I know of a single instance where a person wanted to go on that train, but did not go upon the train to ride. Mr. Meyers, for one. That was during the season we were freighting for him—in 1892. We objected to Mr. Meyers getting on the train. I did not object to it,

personally. I think when he went up, he generally rode upon the cars. Don't think I was ever present when anybody objected to Mr. Meyers riding. If I could explain—the trains were unloaded and ran up to a switch, and then they were unloaded, and during that time, if men got on the train, I think they were allowed to get on and go up to the camp, but there were no facilities offered them—there was no permission given whatever. The two brakemen were on the train, and they were busy handling the brakes. I do not think anybody was put off the trains; so far as I know no objection was made by anybody to their getting on that train. If there were any persons at the upper end of the road and get on the train to ride down, I don't thi nk that the brakeman ordered them off the train. I don't know of any objection being made. I think that is as far as my knowledge goes. I did not see any objection made to persons getting on at the lower end of the road and riding up. Don't know of any instance where an objection was made to their riding, if they wanted to, of my personal knowledge. Mr. Hickey had the power to hire men, and to manage the things up in the woods generally, and did so.

On re-direct examination, the witness testified:

I don't think that I have ever seen men riding on the logs. I have seen men on the flats sometimes coming up. Don't think I have seen anybody coming down the railroad on the loaded cars. Riding on the empty flats, I should call a very small risk indeed. The roadbed is good and there is no reason why the empty flat should go off the track. Coming down of course,

the cars are unevenly loaded, and more than that, the logs are liable to shift, and the danger is increased. One brakeman rides on the rear and one about the middle or the fore part of the train. They generally pick out places where there is the largest place on the platform that is not covered with logs in order to operate their brakes. The brakes are not like an ordinary flat, but can be taken out of a socket. In an ordinary flat the brakes are stationary. We have two brakes on each car, and each brakeman operates the two brakes, one at each end of the car, and then when the train comes down loaded, the brakemens select the places where they have the safest stand, and a good place to stand on. It varies, sometimes one place, then another. I consider the brakeman's place an unsafe job, certainly; of course, the brakeman standing as he does on a platform is in a safer position than a man who sits upon a load of logs, where the chain is liable to give away, or by a sudden jerk the man is liable to be thrown off; while the brakeman standing on the platform can steady himself. The man on the platform would have a chance to get out of the way if logs shook out, while the man on the top of the logs would not have any chance. In the course of the season we have to pick up a good many logs along the track and up the road, logs that have dropped off. They are generally shaken off by a sudden jerk or jar. May be the end of the log of one car striking the end of the log of another car, and going around a curve giving a lurch or something. The logs are wedged on, rolled up on the bunk, the lower layer, and then are wedged

in their place. If these wedges give away, the logs are liable to roll, and the sudden jar of the train is liable to cause those wedges to loosen.

On re-cross examination, the witness testified:

Q. Supposing a log goes over to where the brakeman stands and throws him off, would it be safer to stand on that platform and get thrown off than it would for him to stand on the logs and be thrown the other way?

A. He stands on the platform beside the log, and a sudden lurch or jerk of the train throws the log towards him, and off he goes on the ground. It would be safer to stay there and take that chance than on the top of the logs, because the first movement of the log would be always slow. He is standing upon a solid foundation. He has got a chance to make a movement and save himself. If he is on the top of the load of logs, and they commence to roll underneath him, he does not know where to go. His footing gives way from under him. If the jar was a lively one, it might throw the logs with great violence towards the man standing there. And if the force was great the movement of the logs would move quicker, and with more power. When I say it is safer for the brakeman to stand there and take that chance than to be on the top of the logs, I was basing my opinion on the general movement of the logs. There is no central support to the logs; can't say whether the brake is in the exact center of the rear end of the car or not; I think it would be to one side, because the couplings would come in the center. I don't think the brakeman can operate his brake-bar or his brake-shaft unless he

stood on the platform, with any degree of efficiency. I don't think he would get any leverage to turn it around unless he stood on the platform. The brake is operated by a bar across; if we have a log of a particular length to haul we select a coupling to suit. Sometimes we put three logs on the bottom, and then two on top, and at other times another on top, making six logs, depending upon the size of the logs. Logs run from 12 to 24 feet in length, unless on special order. These logs are loaded on the train with the least expense, in the best shape we can, and we generally aim to leave two cars upon the train where the brakeman can have a footing in order to operate the brakes. I think we make provision to have a chance to operate the brakes, and would not send the train out unless there was a place for the brakeman to operate his brake—that is to operate four brakes—each brakeman operates two brakes. As a general rule the logs could roll off without touching the brakeman. I have no knowledge of how the train to which the accident occurred was loaded.

Henry B. Hickey, called for the defense, testified:

Am in the employ of the Albion Lumber Company; have been a little over three years. Was in the employ of the company in June, 1893. Have made measurements of the road operated by the company. Have been over the ground frequently. My duties are woods superintendent. Have gone up and down the railroad very often. I recently measured from the tank to the wreck. E. S. Johnson, the engineer, and George Cortez, conductor, you call him conductor, he is really a brakeman, were with me. The distance

from the upper tank to what is called the rock is 1,600 feet. From the tank to the west end of the rock cut 1,950 feet; then there is a bridge 240 feet long and 38 feet high; then 470 feet to another bridge, 120 feet across the bridge; then 450 feet comparatively straight track; then there is 540 feet more to a little thorough cut, 180 feet through this thorough cut; 130 feet to another bridge, which is 100 feet long; then 30 feet to the place of the accident. From the upper tank to the last car that remained on the track is 4,500 feet. Did not see the accident. Saw the cars afterwards, say half an hour. The engine and three cars and a half were 150 feet from the lower end of the wreck to the end car, closest to the wreck. It was the fourth car from the engine that separated. The logs that had been on that car were on the railroad track there, but I cannot tell how many logs. The front part of the train was on the track. There were no logs left on that platform; they had been pulled off to the rear. Do not remember the two men that were killed coming to me and asking for work. We were pretty near through with considerable work, and we would be letting men out in a short while. We were hiring them all the while. I never made any statement to anybody that they should ride on those cars—never told anybody to get on those cars, because I did not think it safe. It is not rulable. I have no authority to permit it. It is not safe because the logs are liable to roll off. If the statement is made that I told those men to get on the train, it must be false, because I never told anybody to get on the train. I have had 20 years experience with logging trains, and in my

opinion, it is not safe for a man to ride on a car loaded with logs. It is not possible to so fasten the logs as to prevent all danger of their getting loose and rolling off. Motion of the car would make it impossible. It would not be practicable. I would consider most any place there rather unsafe for a practicable man. The rear of the train is considered the safest place of a logging train—the rear cars. The rock cut is a very deep cut, and quite a prominent feature of the road. It must be fully 100 feet on one side, and possibly 50 on the other. It isn't possible for a man who is in the habit of going up and down that road not to be familiar with that rock cut. I am hardly prepared to state the exact grade, but it is the beginning of a little steeper grade.

On cross-examination, the witness testified:

I made the measurements to which I have testified, two or three days before I came down here. George Cortez and Ed. Johnson were with me. We measured the rails and counted them. We measured the rails with a two-foot rule. They are 35 feet; they are standard 35-pound rails. Each man counted for himself. We measured a great many rails; they were all the same length. Made memorandum of the number of rails; have not the memorandum with me. There were six and a half cars derailed, I think. Every car has two platforms—two parts—two sets of trucks. Don't remember seeing Mr. Briggs there on the day of the accident. Don't remember any conversation with him. Don't remember either of the Portuguese being there that day. Remember having conversation that day after the wreck. Don't know as

I would remember if I had met any of the Portuguese in the woods that day and had conversation with them. Don't know as a fact that I would not. Possibly I would not recollect it if I had seen men there that day —Portuguese and strangers, and had had a conversation with them. I would employ men every day mostly—possibly that day. I would employ men if they did not have blankets. It was immaterial to me if they had blankets or not. I would not furnish them place to sleep. Did not ask them as a rule if they have their blankets. I did not care. I would employ them if they didn't have blankets if I wanted men. I would employ men who had no blankets and no place to sleep. Don't know where they slept. Couldn't state who I have employed without blankets. I will state that I did not make any suggestion about their getting on the train, because naturally I would not make it. There were about four trains running that day. The length of the road is eight miles. Men in the employ of the defendant go from the upper end of the road down to the boom—some ride on the train, some walk. It is not a fact that all employees going down that road from the upper end of the road rode on the train. Could not tell any particular time, but know there has been. Do not know that since I have been there, there has ever been an instance when an employee was on the upper end of the road that wanted to come down to the boom, that they did not ride on the train. Know of an instance when they walked down. Have walked myself; have known Mr. Johnson to walk. I walked down a number of times last summer—can't tell the days. I walked be-

cause the train was not handy. I had to get down to the boom and there was no train there. Would not always have rode if the train had been there. If I wanted to go just purposely to the boom, I would ride, and if not, I would walk. When I wanted to stop at the places along the road and see the track, I would walk. People go up into the redwoods from the lower end of the road —some walk up, some come up in boats, and some ride up. There are lots of instances when a person in the employ of the company was down at the boom at the end of the railroad, and had to come up to the redwoods or the upper end of the road when the train was there, and did not ride on the train. I don't know the names. Nobody was charged any fare to my knowledge. We made objections to persons riding there lots of times. Can't tell when. It was a general objection to anybody riding upon the train. I have put them off last summer, after and before the accident—can't tell who. Can't tell the month. It was within three years, every summer. I remember one instance because I knew the man personally; he was Los Johnson; he was in the employ of the Albion Lumber Company. I think there were three cars on the hind end of the train remaining on the track, and three and a half on the forward end. The logs were on the cars on the hind end. The space between the truck remaining on the track and the lower end of the wreck was 150 feet. There were no logs on the lower half of the track; they were scattered on the track for 150 feet above there—I mean up the river. It was 150 feet from the truck, remaining on the track, with the three cars to the first log. The

logs were mixed in with the trucks that were in the rear. Some of the cars that were derailed had run off the track and into the river. Some lay inside the river, and some went into the river. Track was not broken up a great deal. I think there were three cars behind that the logs had not fallen off of at all. When I came there I found the engineer and Pettit. Pettit was a brakeman; he died a day or two after. There were other people there, but I can't remember who they were. My attention was first attracted by the whistle of the locomotive. They whistle for me when there is any trouble. Couldn't tell the time. It was near supper time. I didn't go immediately, but listened a while; then they blew three or four long whistles, and I started down the track. The engine left the train and went down for a doctor—sent a man for a doctor. It went, I think, about four miles; that would be the closest point. The distance from the wreck down to the lower end of the railroad, I should think, is in the neighborhood of six miles. It was something over 300 feet above the wreck, where you could have the first view of the place where the wreck occurred.

On re-direct examination, the witness testified:

Was generally familiar with the names of the employees of the defendant at this time. We had in the neighborhood of 300 men at that time; they were continually coming and going. I can't distinguish between them at this length of time, unless it was special ones that had special jobs.

Belle Vanloo, called for the defense, testified as follows:

Live in Mendocino county. I have lived up in the redwoods—the Albion woods—about seven miles. Was on the Albion railroad a year ago last June. Rode on the road once in a while. I had friends in the employ of the railroad—Mr. Johnson and Mr. March. Mr. Johnson was the engineer, Mr. March was the fireman and Mr. Cortez was the brakeman. When I rode on the railroad I rode on the engine, in the cab. I rode on the fireman's seat. Didn't ride very often—3 or 4 times, maybe. Remember the accident. I was on the train. Got on at the water tank near the boom and rode up the track. Don't remember the time of day. Was on the train when it came down at the time of the accident. I was sitting on the seat of the fireman, inside of the cab. Know the big rock cut there. I don't think the train was running fast. My recollection is that it was running slow, very slow. The train stopped pretty quick after the accident. I got off the engine and went back to where the men were after the train stopped. Wasn't very far—just a few steps. The engineer was attending to his duty when the accident occurred.

On cross-examination, the witness testified:

The engineer was attending to his duty. Don't remember exactly what he was doing. I have lived in that country up there all my lifetime, but only rode on the train some three or four times. Don't actually know what the engineer was doing at the time of the accident. My husband is in the employ of the company. He is working in the machine shops now; I

think he has been in the employ of the company three or four years. He was then in the employ of the company. I was not then married to him.

Maggie March, called for the defense, testified:

Live at Spring Grove, 6 miles from Albion Mills. Lived there two months. Never lived close to the Albion railroad. Visited there in the summer of 1893—in June. Rode on the railroad a few times—on the engine, in the cab. Was on the train at the time the accident happened the two men were killed. The train was running pretty slow. I got on the train at the boom. Myself and another lady got on at the same time; we went up into the redwoods. I got off the engine after the accident was all over, and walked back to where these men were. Couldn't tell how far—just a little ways. Don't think it was as far as twice across this room.

On cross-examination, the witness testified:

Don't know what time it was when I got on the train. It was before noon. Don't know how many times I rode up and down that day on the train. Think I went up from the boom to the upper end of the road on the train that day two or three times, and rode down each time. I was sitting on the engineer's seat, and Mrs. Vanloo rode on the fireman's seat. She was not on all the time that I was on that day. Don't know how many trips she made. Minnie Vanloo was also on the train; she got on the train when I did. Don't remember when Mrs. Vanloo got on. At the time of the accident the engineer was minding his own business. I do not know what he was doing. He was only a little

ways from me. He was minding the brake, I think. The brake was pretty near there. He was not talking to me. He was talking to no one. I was not paying any attention to what he was doing. The other young lady that got on with me sat on the fireman's seat. There were two young ladies on the fireman's seat, and I sat on the engineer's seat. I felt no jar. First knowledge that I got that the train had been wrecked was when it stopped. Engineer said something had happened. Don't remember when we crossed the bridge just before the wreck occurred. Didn't pay any attention to when we went through the cut. Don't remember when we crossed the bridge crossing the Albion river. Don't remember whether the train stopped at the upper water-tank. No recollection of when we passed the first bridge, nor when we crossed the bridge that crosses the Albion, nor when we went through the cut, nor when we crossed the bridge just before the scene of the wreck. I have no recollection of anything connected with that ride until after the wreck occurred.

On re-direct examination, the witness testified:

Did not notice any increase in the speed of the train. If the train would have been running faster, I would have noticed it. Could not say how fast the train was running. It was going slow anyway, but don't know what rate of speed.

On re-cross examination, the witness testified:

The train was going slow around where the turn was. It was not going as fast as it was, is what I mean. I was not talking with any one. Nobody spoke to me. The fireman was engaged in putting

wood in the engine. I don't know whether he was all the time or not. My attention was not called to anything particularly when I was on that train that day. I am married. Mr. March, who was the fireman that day is my husband. He is now in the employ of the Company. The train was going slower that day than it had gone when I had ridden before. I remember the place where the engineer was in the habit of slowing his train. Don't know the name of the place. Don't know how near it is to the place of the accident. I noticed that the engineer always went a little slower there, but I do not know where it is. It is in that neighborhood.

George Cortez, called for the defense, testified:

I am a laborer. Am working for the Albion Lumber Company. Have worked for the Company about three years. Have been brakeman most of the time of their road. Was conductor in June, 1893. I mean by conductor, looking after train. I worked brakes, switching and unloading cars. Remember the accident when two Portuguese were killed. Was on the that day. Don't know where they got on the train. First saw them after we left the water-tank. They were sitting on the fourth car from the engine. I was on about the sixth car back from the engine. Don't know what time we left the cook-house. Don't know what time the accident occurred. It was in the evening. At the time the accident occurred I was setting brakes. I had just put on two brakes—the two where I was standing. I was sitting on the logs. I put on two brakes and then got up on the logs. Put the

brakes on at the top of the grade. They call rock cut the top of the grade. From the time we left the tank until we got to the top of the grade we were not running very fast. Didn't run very fast after we left the top of the grade. Don't know whether or not the engineer had shut off the steam. We were not running any slower or any faster than ordinarily after we left that place. Running about the same as we usually run—9 or 10 miles an hour.

On cross-examination, the witness testified:

I had charge of the train and the running of it. I got upon the logs when I set the brakes and rode, because it was an easier place to ride. I consider riding on that logging train and sitting upon the logs as safe as a place to ride as down on the platform, down by the side of the logs. The Portuguese that were killed, were on the fourth car from the locomotive. There was one brakeman and another fellow, I don't know who he was. They were in plain sight of me; they were sitting on the logs. Don't remember how many logs were on the car. I noticed there was a flat log on the car. I saw those four men on there just after we left the tank. I saw Mr. Pettit on the train just before the train started from the tank. He was on the car with the Portuguese. Before the train had left the upper tank, I saw the Portuguese on the fourth car with Mr. Pettit and another fellow. When the train started I know they were all on that car. I did not object to the Portuguese or anybody riding. The train was just pulling out when I noticed them. Pettit got on just as they were pulling out. The two Portuguese were there when they were pulling out.

I set the brakes because it is down grade—a heavy grade there. I have no knowledge of the per cent of that grade. Set the brakes right there where I was standing. I set two brakes at whichever end of the car I was on; there was one brake at the end of each car, on each corner of the trucks. I set the brakes at the forward end of one car and at the hind end of another car. Don't know whether the men got on the train at the tank. First saw them when we were pulling out from the upper tank, and whether they got on there before or not, I don't know. I was on the sixth car from the engine. That was one of the wrecked cars. It went on to the grade down to the river. Did not run that day any faster than it usually ran. Don't know the time we left the upper tank, nor the time we left the upper switch. Don't know how long, as a matter of fact, on this occasion it took us to run from the upper switch down to the wreck. I should judge it to be pretty near two miles from the upper switch down to the scene of the wreck. Don't think it is over two miles. Never measured it. Have measured from the tank down to the wreck. It is about 4700 feet from the tank down to where the cars were piled up. Don't know when I made that measurement, but made it myself—Mr. Hickey with me. We made a measurement by counting the rails. Don't know how many rails there were. We all counted them. Don't know how many Mr. Hickey made; don't know how many Mr. Johnson made. It was 1950 feet to the head of the grade. The next is a high bridge 38 feet high and 238 feet long; 470 feet to another bridge, 120 feet

long, 29 feet high, heavy curve; 450 feet of straight track after leaving the last bridge; 540 feet where the calves were first seen on the track; 180 feet to where the calves where next seen; 130 feet to the commencement of the bridge where the bull came from. The bull was the cause of the wreck, I believe—run over him. The bridge was about 100 feet long and about 20 feet high; about 30 feet from the bridge to where they struck the bull. He got on the track and ran over him. Came up from under this bridge right on the track. There is a narrow bank there—ran over him. The locomotive and about two cars and a half passed the bull; he stood right in next to the bank, and the locomotive and three cars—two cars and a half passed him, and I suppose he went to turn around. The bull was standing at the side of the track. My idea is that the bull pushed the logging train off the track and down the bank. I saw Mr. Briggs immediately after the wreck. He did not say to me: "What is the earthly use of running this train at this rate of speed?" I didn't reply. "There is no use in the world of it." The bull was lying next to the bank afterwards; he was dead; laying right beside the track. He was smashed pretty bad all through; no logs laying near him; no cars laying near him. Mr. Johnson and Mr. March were not near me and Mr. Briggs; no one else there. I didn't have any conversation with Mr. Briggs at all; stayed at the wreck until about 7 o'clock, then went back to camp to get Mr. Hickey. Don't know how long Mr. Briggs stayed there; had no conversation with him; am now in the employ of the defendant, Albion Lumber Company.

W. J. March, called for the defense, testified:

Am fireman, in the employ of Albion Lumber Company; have been in that employ about two and a half years; was fireman on the Albion railroad in June, 1893; remember the accident and where it was. It occurred on our last down trip along toward evening; don't know where the Portuguese got on the car; first saw them after the accident; stopped at the upper tank. The rate of speed at which the train came down that evening from the switch to the upper tank was about seven or eight miles an hour; and I should judge from the upper tank to the rock cut was a little slower. From the top of the grade to the accident, I should judge, about 8 or 9 miles an hour. I know that the engineer was not using steam. He shut off steam just before he came to the top of the grade; just before entering the rock cut. The reason for shutting off steam is, it starts a very steep grade there, and it would not do very well to use steam down grade. There is a trestle just before we get to the rock cut. The engineer was using the brakes on that trip down. I didn't notice any increase of speed between the time we left the rock cut and the accident; no more than usual. We were running at our usual rate of speed. I have been acting as fireman on railroads four years. I am able to judge of the speed of the engine from being on it during the run.

On cross-examination, witness testified:

I got off from the engine at the water tank, filled the tank with water and got back to the engine. We then started out towards the boom. Didn't see the

parties that were killed until after the wreck. There were 13 cars in the train—6½ wrecked. Paid no particular attention to the rate of speed of the train after we left the tank until we got to the head of the grade; just naturally noticed, that was all. I noticed there was no extra speed. I was standing up watching—looking ahead; was not putting in any wood. Put in wood after we got to the top of the grade. From the top of the grade down to the wreck, I should judge, was something like half a mile—might have been three-quarters. I was putting in wood at the time of the accident. Started to put in wood 200 or 300 feet from the accident, before we reached the bridge, just before the wreck. I was putting in wood from that time down. The engineer and three young ladies were riding on the engine with me. My wife—she was Miss Day at that time—two Miss Days, and Mrs. Vanloo. Miss Day was sitting in the fireman's seat. I paid no attention to what anyone was doing except myself. I may have spoken a few words: I can't remember that I spoke. Might have talked to one of the four who were on the train with me. I suppose it is natural that I would have spoken to someone. I did not time the rate of speed. I know that it was not going dangerously fast. I suppose 30 or 40 miles an hour would be dangerously fast on that road. Our usual rate is 8 or 9 miles an hour, and that is the usual rate for running logging trains. A little faster than that I would not call dangerous. 5 miles faster I hardly think would be dangerous on that road. After the scene of the wreck I went back to the cars. Found six of them derailed. Found one dead man there and

another one not very far from it. We raised the log and got the Portuguese out, and he died in a few minutes. The engineer came to me and told me to take the engine and go down the track and send for a doctor, which I did. Went down about 4 miles, within a mile I should say from the lower tank. Remained just long enough to tell a man to go for a doctor. Found him near the track; then came back immediately to the wreck. Saw Mr. Briggs there. Can't say how many logs were on the car from which we took the Portuguese.

On re-direct examination, the witness testified:

It is a good track. Good ballast--steel rails--medium rails. The three cars and a half that were attached to the engine ran, after the accident, before stopping, about 150 feet. I saw a dead animal by the track—a bull.

E. S. Johnson, called for the defense, testified:

Am a locomotive engineer. Have been in that business five or six years. The first engine I ever run was on the G. R. and I. road in Michigan. I have run on the Southern Pacific in Oregon, and a short while on the Southern Pacific in Nevada, and last for the Albion Lumber Company, in Mendocino county. Was in the employ of the Albion Lumber Company as engineer in June, 1893, and since February 1, 1892. Was engineer on the train the day the wreck took place. It was within half an hour of six o'clock in the evening. I looked at my watch. It was either 15 minutes to 6 or 15 minutes after 6; I don't remember. I looked at my watch within 5 minutes after the wreck. It was the down trip—the

fourth trip that day. Didn't see the Portuguese on the logs until after the wreck was over. After we pulled out from the tank we run perhaps 4 or 5 miles an hour. Used steam about 1200 feet to a point within 400 or 500 feet of the rock cut, top of the grade. The top of the grade is right in the rock cut. Shut off steam before we got to the top of the grade. The rock cut is right in a curve, and I did not do anything until after we got below the rock cut, and all the train was through the rock cut, and then I applied my brake to help hold the train. Don't know whether there were any other brakes on. Sometimes these cars run very hard, and even have to pull them down grade. I can't feel them putting the brakes on. I know when they are running too fast. We went through rock cut, I should judge, about 4 miles an hour, and probably increased to about 6 miles an hour at the time of the accident. We ran very slow. I have no way of judging of the speed except by the time it takes us to make our trips and the length of the road. I don't know the exact length. On this trip we ran at our usual rate of speed. The first thing that I observed that called my attention that something was wrong, was feeling the train jerk, and looking back and seeing the logs flying up. I could feel the train part. From the time I felt it coming apart until I stopped, I should judge it ran about 300 feet. If the engine was running at the rate of 25 or 30 miles an hour it would probably take half a mile on that road to stop it if I applied the brakes immediately. I measured the distance from the top of the grade down to the wreck—it was 4,700 feet from

the tank to where the locomotive stopped—about 2,800 feet from the top of the grade to where the locomotive stopped. The two parts of the car that divided were 150 feet apart—I measured it. It is necessary to use steam below where the wreck happened for a heavy train like this. We have to use steam from a ways below the wreck clear to the boom. The logs very often get loose on these cars. In my opinion it is not safe for anybody to ride on the logs of any of those cars. I saw a dead animal by the side of the track after the wreck.

On cross-examination, the witness testified:

It was near the scene of the wreck when I looked at my watch. Don't know what time we left the upper switch. We had 13 cars attached to the engine, all loaded with logs. The time it takes to stop a train of 13 cars loaded with logs when they are running 7 or 8 miles an hour, depends upon where we are stopping. If running on a pretty level grade at the rate of seven miles an hour we could stop in a train length. If running more than seven miles an hour, could not stop in a train length. When we left the upper tank, myself, the fireman and three ladies were in the engine. One of the ladies was sitting on my seat; and the other two, if they were sitting at all, were sitting on the fireman's seat. Ran about four miles an hour from upper tank to the head of the grade. Would not agree with the fireman if he said we were running eight or nine miles an hour. I was handling the engine when we ran from the tank to the top of the grade. Standing right in front of the throttle. Before I got to the top of the grade, I shut off steam be-

cause the train runs by gravity, and I shut off the steam so it would slow down more still. Shut off steam about 300 feet from the top of the grade. I looked back quite often over the train. Don't remember of seeing anyone on it. Did not know before reaching the top of the grade whether the two Portuguese and Mr. Briggs, or any other parties were aboard. From the top of the grade we passed three bridges before the wreck occurred. The first was at the rock cut, south fork of the Albion river; then crossed Albion river; that bridge is 240 feet long and 38 feet high. From that bridge to another is 470 feet, that bridge crosses a gulch which runs into the south fork of the Albion river. We crossed the next bridge about 30 feet from the scene of the wreck; that bridge is 100 feet long. Saw no obstacle. The first thing I knew of the accident, I felt a jar; the engine didn't strike anything. Six and a half cars were wrecked. They were loaded with logs. The first thing I found was one of the brakemen getting up. Then I heard one of the Portuguese hollering between the logs. I sent the fireman for the jack-screws, and got the log out; then I took a look at the wreck. The logs that were on the car from which we took the Portuguese were on the ground. There were three cars, and half attached to the engine with no brakes on. Under the circumstances I do not know how far we would have to run before we could stop the engine—about 300 feet. Couldn't stop in less than 300 feet on that grade with that train. I know the grade was heavy. Don't know what it was. I have run on that road three summers. The length of

the cars when they are not loaded, is about 16 feet. I had my hand on the brake all the time—on the lever. I was talking to nobody. No one was talking to the other there at all. I don't know what March was doing. He might have been firing up the engine for aught I know. When the train left the tank I looked back to see the train men—that is, when I got the signal to start out from the tank. I know I looked back at one point, 3 or 4, or 5 or 6 feet from where the last bridge was before the scene of the wreck. Don't remember of seeing any one. I looked back to see if the logs were riding all right. Don't remember of seeing anybody on the third or fourth cars at all. If they had been there when I looked, I would have seen them. Am still in the employ of the defendant. I think it is a uniform grade from the rock cut down to the boom. We only moderate our speed from the tank to the summit, then we take one rate of speed from the rock cut down to the lower end of the grade. I should say the lower end of the the grade is half a mile or more from the scene of the wreck, then it is nearly level from there to the boom, I think. So we had three rates of speed going from the tank down to the boom. Our time for running from the upper switch to the boom is from 30 to 40 minutes.

On re-direct examination, witness testified:

There are curves below the scene of the wreck; that is where we use steam if we have to. The third curve below the scene of the wreck, I think less than half a mile where we commence using the steam. I think the jar I felt was when the train separated. The jar

was very slight. The couplings broke. I saw broken couplings afterwards.

Here the defendant rests.

P. C. Briggs, re-called for the plaintiff in rebuttal, testified:

I had a few words in conversation with Mr. Cortez at the time of the wreck and after the wreck, with reference to the rate of speed, or the swift running of the train. I don't think anybody was present or could have heard the conversation. I did state to Mr. Cortez in substance this: "What is the earthly use of running at the rate of speed they were running." He said in substance: "There is no earthly necessity or reason for it in the world."

The foregoing is all the evidence received at the trial.

The defendant then moved the Court to instruct the jury to find a verdict in favor of the defendant.

After argument by counsel the Court refused to so instruct the jury, to which refusal and ruling of the Court, the defendant duly excepted.

The respective counsel then argued the case to the jury, after which the Court proceeded to instruct the jury as follows, to-wit:

Charge to the Jury.

Gentlemen of the Jury: This action is brought by the plaintiff as the administratrix and legal representative of the deceased, De Nobra (whom I shall always speak of as De Nobra in his charge), under Section 377 of the Code of Civil Procedure of this State, charging the defendant with causing his death—that is De

Nobra's death—by the careless and negligent management of its railroad.

Of course, the main controversy in the case is the conduct of the defendant, and as to whether it was negligent and careless in the sense which I will define those terms to you in this charge. There are several subordinate controversies of facts between the parties, however; one of them is the authority, if any, De Nobra had, upon which, he—De Nobra, the deceased—went upon the train.

The defendant is a logging company, and not a common carrier of passengers, and hence, it has not the responsibility of such, but it was not without duty towards De Nobra. If, therefore, you find from the evidence that Hickey, the Superintendent of the road had the right to employ men for the company, and was in the control and management of the defendant's business including the railroad, and had the apparent authority to permit persons to ride on the cars, and did permit De Nobra to ride; or if you find from the evidence that there was a custom to allow persons to ride which was acquiesced in by the company, and the conductor permitted De Nobra to ride, he was lawfully, in either of those instances, upon the train; but as I have said before, he was not a passenger as the word is understood in regard to railroads. The distinction is important, because if he had been a passenger, the company would have owed to him the utmost care and caution, and the injury being proven, it would devolve upon the defendant to show that it could not have been avoided; but under the circumstances of the present case, it is only responsible for

gross negligence—that is, the defendant is only responsible for gross negligence.

The instance of negligence charged by the plaintiff is the reckless running of the train at a dangerous rate of speed. She claims the rate was thirty miles an hour; the defendant contends that it was only run at 7 to 10 miles an hour. I am speaking of at the time of the accident. If you find from the evidence that the train was run at 30 miles an hour, and you also find it was gross negligence to do so—that is, to so run it—you will find on this issue for the plaintiff. If you find that it was not so run, but, on the contrary, it was run at from 7 to 10 miles an hour, and that this was not gross negligence, you will find on this issue for the defendant. I have instanced these two rates of speed of 30 miles an hour and from 7 to 10 miles an hour; but if the evidence satisfies you, gentlemen of the jury, that the train was run at a different rate, from either 30 miles an hour or from 7 to 10 miles an hour, then you will have to address yourself to the inquiry as to whether or not such rate was or was not gross negligence. If you find it was gross negligence, you will find for the plaintiff; and if you find it was not, you will find for the defendant. I think I have made myself understood. I will repeat it, so as to be careful of it, because that is one of the main controversies in the case.

The negligence charged by the plaintiff is the reckless running of the train at a dangerous rate of speed. She claims the rate was 30 miles an hour; the defendant contends that it was run at from 7 to 10 miles an hour. I am speaking of at the time of the accident.

If you find from the evidence that the train was run at the rate of 30 miles an hour, and you also find that it was gross negligence to do so, that is, to so run it, you will find on this issue for the plaintiff. If you find that it was not so run, but on the contrary it was run at from 7 to 10 miles an hour, and that this was not gross negligence, you will find on this issue for the defendant. I have instanced these two rates of speed of 30 miles an hour and from 7 to 10 miles an hour, but if the evidence satisfies you that the train was run at a different rate from either 30 miles an hour or from 7 to 10 miles an hour, then you will have to address yourself to the inquiry as to whether or not such rate was or was not gross negligence. If you find it was gross negligence you will find for the plaintiff, and if you find it was not, you will find for the defendant. The burden of proof of that issue of negligence is on the plaintiff in the issue.

The defendant contends that De Nobra was guilty of negligence in getting on the logs. The burden of proof is on to establish that this was negligence, and it must be shown by the defendant by a preponderance of evidence, unless the testimony of the plaintiff shows it. If, therefore, you find from the evidence that De Nobra was guilty of negligence in riding upon the logs, and that such riding directly contributed to the injury, you will find for the defendant, unless you also find that the defendant might have by the exercise of reasonable care and prudence avoided the consequences of such negligence.

It is necessary for me to define to you what negligence is, and it is not an easy matter to represent the

distinction between the degrees of it. Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. It is not absolute or intrinsic, but always relative to some circumstance of time, place or persons.

There are three degrees of it; slight, ordinary and gross. Slight negligence is the want of great care and diligence; ordinary negligence, is the want of ordinary care and diligence; gross negligence, is the want of slight care and diligence. You will observe, gentlemen of the jury, that negligence and care are the opposites of each other. Hence, an established law writer has considered the better rule, or better definition to be as follows:

" A better rule is that which declares slight care to be such as is usually exercised under circumstances similar to those of the particular case, in which the question arises, and where their own interests are to be protected from a similar injury by men of common sense, but of much less than the average prudence of the community in which they live; ordinary care to be such as is usually exercised under the like circumstances by men of average prudence; and great care, to be such as is exercised under such circumstances by men of usual prudence. Or, to put the rule in another form, great care implies the use of more vigilence and caution than men of average prudence would use in the like case, for themselves; ordinary care, means such as is used by men of average prudence for themselves; and slight care

means so little as to justify a suspicion that the person lacking it was indifferent to the consequence of his neglect. Negligence should not, indeed, be considered gross, unless so great as to warrant this conclusion of recklessness, in the absence of explanation.

If you find on the issue of negligence under the instructions I have given you, in favor of the plaintiff, you will then consider the next proposition as to the amount of damages that you should award her.

As I said before, the action is brought under section 377 of the Code of Civil Procedure of the State of California, which enables a person to bring suit for the death of a person caused by the wrongful act or neglect of another, and in such suit such damages may be given as under all the circumstances of the case may be just.

As elements, you have a right to consider the following: If you find for the plaintiff, your verdict should be for such an amount as under all the circumstances in the case is reasonable and just; and in this connection you are entitled to take into consideration the age of De Nobra, and as to whether his wife and children were dependent on him for support, and as to the amount of money he was capable of earning, and did earn by his labor, and also the fact as to whether he was an able-bodied and industrious man. Those elements you should take into consideration if you so find them—in other words, if you find them to exist from the evidence.

The credibility of the witnesses, gentlemen, of course, is for you to determine. You are not bound to decide in favor of the side which has the greatest number

of witnesses as against a lesser number or against presumptions which convince your minds; but all other circumstances being equal, two witnesses are better than one.

Every witness is presumed to speak the truth, and you are bound to believe him unless he is discredited by the manner in which he gives his testimony, or in what he testifies about. In other words, you cannot arbitrarily reject the testimony of a witness. There must be some reason for it—some test to be applied to him, and if under the test he is not credible, you reject his testimony; if under such test he is credible, you accept his testimony, the presumption being that he told the truth.

When you retire to the juryroom, gentlemen of the jury, you will select one of your number as foreman, and when you have agreed upon a verdict, you will come into court. The verdict must be unanimous in this court. In the State Court less than the whole can render a verdict, but in this court the verdict must be unanimous. All twelve must concur in the verdict.

I have prepared two forms of verdict, which, according as you find, you will sign. One is, "We, the jury, find in favor of the plaintiff," and assess the damages at the sum of blank; if you find for the defendant, "We, the jury, find in favor of the defendant."

The defendant thereupon duly objected and excepted to so much of the foregoing charge, and every part thereof, which reads as follows, to-wit:

1.

"The defendant is a logging company, and not a "common carrier of passengers, and hence it has not "the responsibility of such, but it was not without "duty towards De Nobra. If, therefore, you find "from the evidence, that Hickey, the Superintendent "of the road, had the right to employ men for the "company, and was in the control and management "of the defendant's business, including the railroad, "and had the apparent authority to permit persons to "ride on the cars, and did permit De Nobra to ride, "or if you find from the evidence, that there was "a custom to allow persons to ride, which was acqui-"esced in by the company, and the conductor per-"mitted De Nobra to ride, he was lawfully, in either "of those instances, upon the train; but, as I have "said before, he was not a passenger as the word is "understood in regard to railroads. The distinction "is important, because, if he had been a passenger, "the company would have owed to him the utmost "care and caution, and the injury being proven, it "would devolve upon the defendant to show that it "could not have been avoided, but under the circum-"stances of the present case, it is only responsible for "gross negligence—that is, the defendant is only re-"sponsible for gross negligence."

The Court overruled said objection, to which the defendant duly excepted.

The defendant also duly objected and excepted to so much of the foregoing charge, and every part thereof, which reads as follows, to-wit:

2.

" If you find from the evidence that the train was " run at 30 miles an hour, and you also find it was " gross carelessness to do so—that is, to so run it—you " will find on this issue for the plaintiff. If you find " it was not so run, but on the contrary it was run at " from 7 to 10 miles an hour, and that this was not " gross negligence, you will find on this issue for the " defendant. I have instanced these two rates of speed " of 30 miles an hour and from 7 to 10 miles a hour, " but if the evidence satisfies you, gentlemen of the " jury, that the train was run at a different rate from " either 30 miles a hour or from 7 to 10 miles an hour, " then you will have to address yourself to the inquiry " as to whether or not such rate was or was not gross " negligence. If you find it was gross negligence, you " will find for the plaintiff, and if you find it was not, " you will find for the defendant. I think I have " made myself understood. I will repeat it so as to " be careful of it, because that is one of the main " controversies in this case.

" The negligence charged by the plaintiff is the " reckless running of the train at a dangerous rate of " speed. She claims that the rate was 30 miles an " hour; the defendant contends that it was run at from " 7 to 10 miles an hour. I am speaking of at the " of the accident. If you find from the evidence that " the train was run at the rate of 30 miles an hour, " and you also find that it was gross negligence to do " so—that is, to so run it—you will find on this " issue for the plaintiff. If you find that it " was not so run, but on the contrary, it was

" run at from 7 to 10 miles an hour, and that " this was not gross negligence, you will find on " this issue for the defendant. I have instanced these " two rates of speed of 30 miles an hour and from 7 to " 10 miles an hour; but if the evidence satisfies you " that the train was run at different rates from either " 30 miles an hour or from 7 to 10 miles an hour, then " you will have to address yourself to the inquiry as " to whether or not such rate was, or was not, gross " negligence. If you find it was gross negligence, you " will find for the plaintiff, and if you find it was not, " you will find for the defendant."

The Court overruled said objection, to which the defendant duly excepted.

The defendant also duly objected and excepted to so much of said charge, and every portion thereof, which reads as follows, to-wit:

3.

" The defendant contends that De Nobra was guilty " of negligence in getting on the logs. The burden of " proof was on it to establish that this was negligence, " and it must be shown by the defendant by a prepon- " derance of evidence, unless the testimony of the " plaintiff shows it. If, therefore, you find from the " evidence that De Nobra was guilty of negligence in " riding upon the logs, and that such riding directly " contributed to the injury, you will find for the de- " fendant, unless you also find that the defendant " might have, by the exercise of reasonable care and " prudence, avoided the consequence of such negli- " gence."

The Court overruled such objection, to which the defendant duly excepted.

The defendant also duly objected and excepted to so much of the charge to the jury, and to every portion thereof, which reads as follows, to-wit:

4.

"The action is brought under Section 377 of the "Code of Civil Procedure of the State of California, "which enables a person to bring suit for the death of "a person caused by the wrongful act or neglect of "another, and in such suit such damages may be "given as under all the circumstances of the case "may be just. As elements you have a right to con- "sider the following: If you find for the plaintiff, "your verdict should be for such an amount as under "all the circumstances in the case is reasonable and "just."

The Court overruled said objection and exception to which the defendant duly excepted.

Each and all the foregoing objections and exceptions to the charge to the Jury were made on the ground that the evidence did not satisfy the same.

The defendant also asked the Court to give the following instructions to the Jury, to-wit:

"Before you can find in favor of the plaintiff in "this action, you must be convinced by preponderance "of evidence of the following facts:

"1st. That the defendant owed a duty to the plain- "tiff's intestate."

"2nd. That the plaintiff's intestate was not him- "self guilty of negligence in taking a position upon "the top of a loaded car in a logging train."

" 3rd. That it was on account of the negligence of " the defendant's employees that the accident occurred.

" Unless you find in favor of the plaintiff on all " three of these propositions, your verdict must be for "the defendant."

The Court refused to give said instruction, to which ruling the defendant duly excepted.

The defendant also asked the Court to give the following instruction to the jury, to wit:

" In regard to the first proposition, namely, that the " defendant must owe a duty to the plaintiff's intes- " tate, I charge you as follows, namely, that the fact " that other parties were permitted by the defendant " to ride upon their cars, did not give the plaintiff's " intestate any right to take passage on those cars. " Likewise, if you believe the statement of the de- " fendant's witness, Hickey, that he did not invite or " authorize the plaintiff's intestate to ride upon the " cars, then the plaintiff's intestate was a trespasser, " and the defendant owed the plaintiff's intestate no " duty.

" In this connection I also charge you as matter of " law that Mr. Hickey, the Superintendent of the de- " fendant's railroad, had no ostensible authority to in- " vite the plaintiff's intestate, to ride upon the de- " fendant's cars. The defendant's cars were used for " the purpose of transporting logs and lumber and " were not intended for the purpose of carrying pas- " sengers, and Mr. Hickey, under the evidence, had " no authority to invite or authorize persons to ride " on the defendant's cars."

The Court refused to give said instruction to the jury, to which ruling the defendant duly excepted.

The defendant also asked the Court to give to the jury the following instruction, to-wit:

"In regard to the second proposition, namely, as to "whether the plaintiff's intestate was himself guilty "of contributory negligence, I charge you, that if it "was not safe to ride upon a train of cars loaded with "logs, or if it was not safe to ride upon the top of a "car-load of logs, then the plaintiff is guilty of con- "tributory negligence, and is not entitled to recover.

"In considering the question as to whether or not "it is safe for a party to ride upon such a train as the "plaintiff's intestate rode upon at the time of the "accident, you may take into consideration the usual "and ordinary incidents natural to the running of "such a train, and as to whether accidents are liable "to happen under the best of management in operat- "ing such a train.

"A party has no right to put himself in a dangerous "position and thereby increase the ordinary risks "attending transportation upon railroads. You may "also take into consideration the fact that this train "was not intended for the carrying of passengers, and "therefore that the defendant was under no obligation "to make it safe for persons riding upon it. In this "connection I charge you as follows:

"'If a person takes an exposed position upon a "'train not designed for the use of passengers, he "'himself incurs the special risks of that position, "'whether he takes it by license, non-interference, or "'even express permission of the conductor.'

"The defendant's logging train was obviously not intended for passengers. There was no vehicle attached to it in any way adapted for passengers

If you believe that the plaintiff's intestate at the "time of the accident was riding for his own conve- "nience in a place where it was not safe or prudent "to ride, he took upon himself the risk of so doing, "whether he did so on the license or invitation of "Mr. Hickey or not. It is not within the apparent "scope of Mr. Hickey's authority to permit persons "to ride on his logging train, nor can the fact that he "allowed plaintiff's intestate to do so make the de- "fendant responsible."

The Court refused to give said instruction, to which ruling the defendant duly excepted.

The defendant also asked the Court to give the following instruction to the jury, to-wit:

"The witnesses Hickey and Standish, though they "afterwards testified on behalf of the defendant's "were introduced as witnesses by the plaintiff; there- "fore the plaintiff cannot attack their credibility.

"In regard to the third proposition, it is necessary "for the plaintiff to prove to your satisfaction that "the accident was caused by the negligent conduct of "the defendant's servants. If you believe from the "evidence that the defendant did not run its railroad "at an excessive rate of speed, and that the accident "was such a one as might ordinarily happen in the "management of such a business, without fault on "the part of the defendant's employee then you must "find for the defendant. To prove such fault on "the part of the defendant's employees is upon the "plaintiff."

The Court refused to give said instructions, or any portion thereof, to which ruling and decision the defendant duly excepted.

Thereafter the cause was submitted by the Court to the jury, and the said jury returned a verdict in favor of the plaintiff, and assessed the damages at the sum of $2000.00. This verdict was duly entered and recorded.

Thereafter, and within due time, the defendant served and filed its notice of intention to move for a new trial, and specified as the grounds of said motion errors in law occurring at the trial and excepted to by the defendant, and also the insufficiency of the evidence to justify the verdict, and that said verdict is against law; said notice also stated that the said motion for a new trial would be made upon a statement of the case to be thereafter settled.

Specification of Errors of Law Occurring at the Trial and Excepted to by the Defendant.

The defendant specifies the following errors upon which it will rely on the motion for a new trial, to-wit:

1. The Court erred in denying the defendant's motion to instruct the jury to find a verdict in favor of the defendant.

2. The Court erred in not instructing the jury to find a verdict in favor of the defendant.

3. The Court erred in giving so much of its charge to the jury as was specially excepted to and marked No. 1, and hereinabove set out.

4. The Court erred in giving so much of its charge to the jury as was specially excepted to, and being charge No. 2, excepted to as hereinabove stated.

5. The Court erred in giving so much of its charge to the jury as was specially excepted to, and being charge No. 3 excepted to as hereinabove stated.

6. The Court erred in giving so much of its charge to the jury as was specially excepted to, and being charge No. 4 excepted to as hereinabove stated.

7. The Court erred in refusing to give each and all the charges to the jury specially requested by the defendant, and hereinabove specially set out.

8. The Court erred in refusing to give any portion of the charges to the jury requested by the defendant, and hereinabove set out.

The defendant hereby specially refers to each and every portion of the charge given to the jury and which was specially objected to, and will claim that no portion of said charge or charges so objected to was justified by the evidence as hereinbefore set out.

The defendant hereby refers to the respective charges asked by the defendant to be given to the jury as hereinbefore set out, and will claim on the hearing of the motion for a new trial that each and all said charges should have been given.

Specification of Particulars in Which the Evidence is Insufficient to Justify the Verdict.

The defendant specifies that following particulars, showing that the evidence was not sufficient to justify the verdict, to-wit:

There was no evidence showing any legal liability on the part of the defendant for the death of the

plaintiff's intestate, and therefore said verdict is against law.

There was no evidence to show that defendant owed any duty to plaintiff's intestate.

There was no evidence showing, or tending to show, that plaintiff's intestate came to his death by the wanton, wilful or malicious act of the defendant, or its employees; nor was there any evidence showing, or tending to show, that plaintiff's intestate's death was caused by the gross or any negligence of the defendant or its servants. In that behalf, the only evidence offered by plaintiff tending to show negligence on the part of the defendant was that of the witness Briggs who testified in substance that the defendant's train was running at a dangerous rate of speed. But this evidence was shown to be untrue by the testimony of numerous witnesses, the distance run, the quickness with which the train was stopped, the situation of the train after the accident, and the positive testimony that the accident was caused by a bull on or near the track, therefore the evidence does not justify the verdict.

CHAS. E. WILSON,
Attorney for Defendant.

The foregoing statement was presented and served within due time, and is settled and allowed.

JOSEPH McKENNA,
Judge of U. S. Circuit Court.

Dated February 28, 1895.

The foregoing statement is correct, and may be settled and allowed.

A. B. HUNT,
Attorney for Plaintiff.

February 28, 1895.

[Endorsed]: Service of the within statement and receipt of a copy thereof, this 15th day of February, 1895, is hereby admitted. A. B. Hunt, Attorney for Plaintiff. Filed February 28th, 1895. W. J. Costigan, Clerk.

At a stated Term, to-wit: the February Term, A. D. 1895, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom, in the City and County of San Francisco, on Monday the 25th day of March, in the year of our Lord one thousand eight hundred and ninty-five.

Present: The Honorable JOSEPH McKENNA, Circuit Judge.

MARIA DE NOBRA, Admx., etc., vs. ALBION LUMBER CO. — No. 11,913.

Order Denying Motion for a New Trial.

The motion of defendant for a new trial herein, came on regularly for hearing. Warren Olney and Chas. E. Wilson, Esqs., appearing for defendant and said motion, and A. B. Hunt, Esq., appearing for plaintiff and against said motion. After argument of

counsel duly heard and considered, it was ordered that said motion be and is hereby denied. By consent of counsel for plaintiff, it is ordered that execution be stayed fifteen days from date.

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

MARIA DE NOBRA, Administratrix of the Estate of Jose De Nobra, Deceased, Plaintiff, vs. ALBION LUMBER COMPANY, (a Corporation), Defendant.	At Law.

Petition for Writ of Error.

The defendant, Albion Lumber Company, feeling itself aggrieved by the judgment made and entered by said Court on the 30th day of January, A. D. 1895, against defendant and in favor of plaintiff, and the order of said Court denying said defendant's motion for a new trial made and entered herein on the 25th day of March, A. D. 1895, now comes by its attorneys, Charles E. Wilson and Warren Olney, and petitions said Court for an order allowing this defendant a writ of errors from the judgment herein and from said final decision denying the defendant's motion for a new trial, to the Honorable Court of the United States Circuit Court of Appeals, for the Ninth

Circuit, sitting at the City of San Francisco, State of California, and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the security which defendant shall furnish upon said writ of error.

And your petitioner will ever pray, etc.

CHAS. E. WILSON,
WARREN OLNEY,
Attorneys for Defendant.

[Endorsed]: Filed April 5th, 1895. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, and Northern District of California.

MARIA DE NOBRA, Administratrix of the Estate of Jose De Nobra, Deceased, Plaintiff,	}	At Law.
vs.		
ALBION LUMBER COMPANY (a Corporation), Defendant.		

Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignments of errors of law occurring at the trial, and excepted to by defendant, to-wit:

I.

The Court erred in denying the defendant's motion to instruct the jury to find in favor of the defendant.

II.

The Court erred in not instructing the jury to find a verdict in favor of the defendant.

III.

The Court erred in giving that portion of its charge to the jury, which is in the following language, to-wit:

"The defendant is a logging company, and not a "common carrier of passengers, and hence it has not "the responsibility of such, but it was not without "duty towards De Nobra. If, therefore, you find from "the evidence that Hickey, the superintendent of the "road, had the right to employ men for the company, "and was in the control and management of the de-"fendant's business, including the railroad, and had "the apparent authority to permit persons to ride on "the cars, and did permit De Nobra to ride; or if you "find from the evidence that there was a custom to "allow persons to ride which was acquiesced in by the "company, and the conducter permitted De Nobra to "ride, he was lawfully, in either of these instances, "upon the train; but as I have said before, he was "not a passenger as the word is understood in re-"gard to railroads. The distinction is important, be-"cause, if he had been a passenger, the company "would have owed him the utmost care and caution, "and the injury being proven, it would devolve upon "the defendant to show that it could not have been "avoided; but under the circumstances of the present "case it is only responsible for gross negligence—that "is, the defendant is only responsible for gross negli-"gence."

IV.

The Court erred in giving that portion of its charge to the jury which is in the following language, to-wit:

"If you find from the evidence that the train was "run at 30 miles an hour, and you also find it was "gross carelessness to do so—that is, to so run it— "you will find on this issue for the plaintiff. If you "find it was not so run, but on the contrary, it was "run at from 7 to 10 miles an hour, and that this was "not gross negligence, you will find on that issue for "the defendant. I have instanced these two rates of "speed of 30 miles an hour and from 7 to 10 miles an "hour, but if the evidence satisfies you that the train "was run at a different rate from either 30 miles an "hour or from 7 to 10 miles an hour, then you will "have to address yourself to the inquiry as to whether "or not such rate was or was not gross negligence. "If you find it was gross negligence you will find "for the plaintiff, and if you find it was not, you will "find for the defendant."

V.

The Court erred in giving that portion of its charge to the jury which is in the following language, to-wit:

"The defendant contends that De Nobra was guilty "of negligence in getting on the logs. The burden of "proof was on it to establish that this was negli- "gence, and it must be shown by the defendant by "a preponderance of evidence, unless the testimony "of the plaintiff shows it. If therefore, you find "from the evidence that De Nobra was guilty of "negligence in riding upon the logs, and that

" riding directly contributed to the injury, you " will find for the defendant, unless you also " find that the defendant might have by the exercise " of reasonable care and prudence avoided the conse- " quence of such negligence."

VI.

The Court erred in giving that portion of its charge to the Jury which is in the following language, to-wit:

" The action is brought under Section 377 of the " Code of Civil Procedure of the State of California, " which enables a person to bring suit for the death " of a person caused by the wrongful act or neglect " of another, and in such suit damages may be given " as under all circumstances of the case may be just. " As elements, you have a right to consider the follow- " ing: 'If you find for the plaintiff, your verdict " should be for such an amount as under all the cir- " cumstances in the case is reasonable and just.' "

VII.

The Court erred in refusing to give each and all the charges and instructions to the jury specially requested by the defendant, which said charges and instructions are in the following words and figures, to-wit:

" Before you can find in favor of the plaintiff in " this action, you must be convinced by preponder- " ance of evidence of the following facts:

" 1st. That the defendant owed a duty to plaintiff's " intestate.

" 2nd. That the plaintiff's intestate was not him- " self guilty of negligence in taking a position upon " the top of a loaded car in a logging train.

"3rd. That it was on account of the negligence "of the defendant's employees that the accident "occurred.

"Unless you find in favor of the plaintiff on all "three of these propositions, your verdict must be for "the defendant."

"In regard to the first proposition, namely, that the "defendant must owe a duty to the plaintiff's intes- "tate, I charge you as follows, namely, that the "fact that other parties were permitted by the defend- "ant to ride upon their cars, did not give the plain- "tiff's intestate any right to take passage on those "cars. Likewise, if you believe the statement of the "defendant's witness, Hickey, that he did not invite "or authorize the plaintiff's intestate to ride upon the "cars, then the plaintiff's intestate was a trespasser, "and the defendant owed the plaintiff's intestate no "duty.

"In this connection I also charge you as matter of "law that Mr. Hickey, the Superintendent of the de- "fendant's railroad, had no ostensible authority to "invite the plaintiff's intestate to ride upon the de- "fendant's cars. The defendant's cars were used for "the purpose of transporting logs and lumber, and "were not intended for the purpose of carrying pas- "sengers, and Mr. Hickey, under the evidence, had "no authority to invite or authorize persons to ride "on the defendant's cars."

"In regard to the second proposition, namely, as to "whether the plaintiff's intestate was himself guilty "of contributory negligence, I charge you, that if it "was not safe to ride upon a train of cars loaded with

" logs, or if it was not safe to ride upon the top of a " carload of logs, then the plaintiff is guilty of con- " tributory negligence, and is not entitled to recover.

" In considering the question as to whether or not " it is safe for a party to ride upon such a train as the " plaintiff's intestate rode upon at the time of the " accident, you may take into consideration the usual " and ordinary incidents natural to the running " of such a train, and as to whether accidents are " liable to happen under the best of management in " operating such a train.

" A party has no right to put himself in a danger- " ous position and thereby increase the ordinary risks " attending transportation upon railroads. You may " also take into consideration the fact that this train " was not intended for the carrying of passengers, and " therefore that the defendant was under no obliga- " tion to make it safe for persons riding upon it. In " this connection I charge you as follows:

" If a person takes an exposed position upon a train " not designed for the use of passengers, he himself " incurs the special risks of that position, whether he " takes it by license, non-interference, or even express " permission of the conductor.

" The defendant's logging train was obviously not " intended for passengers. There was no vehicle at- " tached to it in any way adapted for passengers.

" If you believe that the plaintiff's intestate at the " time of the accident was riding for his own con- " venience in a place where it was not safe or prudent " to ride, he took upon himself the risk of so doing, " whether he did so on the license or invitation of

" Mr. Hickey or not. It is not within the apparent " scope of Mr. Hickey's authority to permit persons " to ride on his logging train, nor can the fact that he " allowed plaintiff's intestate to do so make the de- " fendant responsible.

"The witnesses Hickey and Standish, though they " afterwards testified on behalf of the defendant, were " introduced as witnesses by the plaintiff; therefore " the plaintiff cannot attack their credibility."

"In regard to the third proposition, it is necessary " for the plaintiff to prove to your satisfaction that " the accident was caused by the negligent conduct of " the defendant's servants. If you believe from the " evidence that the defendant did not run its railroad " at an excessive rate of speed, and that the accident " was such a one as might ordinarily happen in the " management of such a business, without fault on the " part of the defendant's employees, then you must " find for the defendant. To prove such fault on the " part of the defendant's employees is upon the " plaintiff."

VIII.

The Court erred in refusing to give to the jury that portion of the charges and instructions specially requested by the defendant, following, to-wit:

"Before you can find in favor of the plaintiff in this " action, you must be convinced by preponderance of " evidence of the following facts:

"1st. That the defendant owed a duty to plaintiff's " intestate.

"2nd. That the plaintiff's intestate was not him- " self guilty of negligence in taking a position upon " the top of a loaded car in a logging-train.

"3d. That it was on account of the negligence of "the defendant's employees that the accident occurred.

"Unless you find in favor of the plaintiff on all "three of these propositions, your verdict must be for the defendant."

IX.

The Court erred in refusing to give to the jury that portion of the charges and instructions specially requested by the defendant, following, to-wit:

"In regard to the first proposition, namely, that the "defendant must owe a duty to the plaintiff's intes- "tate, I charge you as follows, namely, that the fact "that other parties were permitted by the defendant "to ride upon their cars, did not give the plaintiff's "intestate any right to take passage on those cars. "Likewise, if you believe the statement of the defend- "ant's witness, Hickey, that he did not invite or au- "thorize the plaintiff's intestate to ride upon the cars, "then the plaintiff's intestate was a trespasser, and "the defendant owed the plaintiff's intestate no duty.

"In this connection I also charge you, as a matter "of law, that Mr. Hickey, the Superintendent of the "defendant's railroad, had no ostensible authority to "invite the plaintiff's intestate to ride upon the defend- "ant's cars. The defendant's cars were used for the pur- "pose of transporting logs and lumber, and were not in- "tended for the purpose of carrying passengers, and "Mr. Hickey, under the evidence, had no authority to "invite or authorize persons to ride on the defend- "ant's cars."

X.

The Court erred in refusing to give to the jury that portion of the charges and instructions specially requested by the defendant, following, to-wit:

"In regard to the second proposition, namely, as to "whether plaintiff's intestate was himself guilty "of contributory negligence, I charge you, that if "it was not safe to ride upon a train of cars loaded "with logs, or if it was not safe to ride upon the top "of a carload of logs, then the plaintiff is guilty of "contributory negligence, and is not entitled to re-"cover.

"In considering the question as to whether or not "it is safe for a party to ride upon such a train as the "plaintiff's intestate rode upon at the time of the "accident, you may take into consideration the usual "and ordinary incidents natural to the running of "such train, and as to whether accidents are liable to "happen under the best of management in operating "such a train.

"A party has no right to put himself in a danger-"ous position, and thereby increase the ordinary risks "attending transportation upon railroads. You may "also take into consideration the fact that this train "was not intended for the carrying of passengers, and "therefore that the defendant was under no obliga-"tion to make it safe for persons riding upon it. In "this connection I charge you as follows:

"If a person takes an exposed position upon a train "not designed for the use of passengers, he himself "incurs the special risks of that position, whether he "takes it by license, non-interference, or even express "permission of the conductor.

"The defendant's logging-train was obviously not "intended for passengers. There was no vehicle at- "tached to it in any way adapted for passengers.

"If you believe that the plaintiff's intestate at "the time of the accident was riding for his own "convenience in a place where it was not safe or "prudent to ride, he took upon himself the risk of so "doing, whether he did so on the license or invitation "of Mr. Hickey or not. It is not within the apparent "scope of Mr. Hickey's authority to permit persons to "ride on his logging trains, nor can the fact that he "allowed plaintiff's intestate to do so make the de- "fendant responsible."

XI.

The Court erred in refusing to give to the jury that portion of the charges and instructions specially requested by the defendant, following, to-wit:

"The witnesses Hickey and Standish, though they "afterwards testified on behalf of the defendant, were "introduced as witnesses by the plaintiff, therefore "the plaintiff cannot attack their credibility.

"In regard to the third proposition, it is necessary "for the plaintiff to prove to your satisfaction that "the accident was caused by the negligent conduct of "the defendant's servants. If you believe from the "evidence that the defendant did not run its railroad "at an excessive rate of speed, and that the accident "was such a one as might ordinarily happen in the "management of such a business, without fault of the "defendant's employees, then you must find for the "defendant. To prove such fault on the party of the "defendant's employees is upon the plaintiff."

XII.

The Court erred in denying the defendant's motion for a new trial.

XIII.

The Court erred in refusing to grant defendant's motion for a new trial herein, upon the ground that the evidence is insufficient to justify the verdict; and herein the defendant specifies that there was no evidence showing any legal liability on the part of the defendant for the death of plaintiff's intestate, and therefore said verdict is against law.

That there was no evidence showing that defendant owed duty to plaintiff's intestate.

There was no evidence showing or tending to show that plaintiff's intestate came to his death by the wanton, wrongful or malicious act of the defendant, its agents, employees or servants; nor was there any evidence showing or tending to show that plaintiff's intestate's death was caused by the gross or any negligence of the defendant or its servants. In that behalf, the only evidence offered by plaintiff tending to show negligence on the part of the defendant was that of the witness, Briggs, who testified in substance that the defendant's train was running at a dangerous rate of speed. But this evidence was shown to be untrue by the testimony of numerous witnesses, the distance run, the quickness with which the train was stopped, the situation of the train after the accident, and the positive testimony that the accident was caused by a bull on or near the track Therefore the evidence does not justify the verdict.

XIV.

That the judgment is against law.

XV.

That the judgment is contrary to the evidence.

XVI.

That the Court erred in entering judgment in favor of the plaintiff and against the defendant.

The statement on motion for a new trial, as settled and allowed by the Honorable JOSEPH MCKENNA, the Judge who heard this cause, is hereby referred to and made a part of this assignment of errors.

And the defendant, the Albion Lumber Company, prays that said judgment be reversed, annulled and altogether held for naught, and that its motion for a new trial be granted, and that it may be restored to all things which it has lost by occasion of said judgment, and order refusing to grant a new trial.

CHAS. E. WILSON,
WARREN OLNEY,
Attorneys for Defendants.

[Endorsed]: Filed April 5th, 1895. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

MARIA DE NOBRA, Administratrix of the Estate of Jose De Nobra, Deceased, Plaintiff, vs. ALBION LUMBER COMPANY (a Corporation), Defendant.	At Law.

Order for Writ of Error.

This fifth day of April, 1895, came the defendant by its attorneys, Charles E. Wilson and Warren Olney, and filed herein and presented to the court its petition, praying for the allowance of a writ of error, intended to be urged by said defendant. On consideration whereof, it is ordered that a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment hereinbefore, on the 30th day of January, 1895, filed and entered herein against defendant, and in favor of plaintiff, and from the order of the Court denying defendant's motion for a new trial herein made and entered on the 25th day of March, A. D. 1895, be and the same is hereby allowed, and that a certified transcript of the record be forthwith transmitted to said United States Circuit Court of Appeals, for the Ninth Circuit, upon a bond being given and approved by the undersigned Judge, or in his absence by the Clerk of said Court, conditioned in the sum of five hundred dollars, that the said Albion Lumber Company, defendant, shall prosecute its writ

to effect, and if it fails to make this plea good, shall answer all costs; and

It is further ordered, that execution of said judgment shall be stayed upon said Albion Lumber Company, giving a supersedeas bond, conditioned in the sum of four thousand dollars.

Dated San Francisco, California, April 5th, 1895.

JOSEPH McKENNA,
Circuit Judge.

[Endorsed]: Filed April 5th, 1895. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, and Northern District of California.

MARIA DE NOBRA, Administratrix of the Estate of Jose De Nobra, Deceased,
Plaintiff,
vs.
ALBION LUMBER COMPANY (a Corporation),
Defendant.

Bond on Writ of Error.

Know All Men By These Presents: That we, the Albion Lumber Company, a corporation incorporated, organized and existing under the laws of the State of California, as principal, and John S. Kimball and Duncan McNee, as sureties, are held and firmly bound unto the above-named Maria De Nobra, Administra-

trix of the estate of Jose De Nobra, deceased, in the sum of five hundred dollars, to be paid to the said Maria De Nobra, administratrix, as aforesaid, her successors or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 9th day of April, 1895.

Whereas, the above-named Albion Lumber Company has prosecuted a writ of error to correct a judgment rendered in the above-entitled suit by the Judge of the Circuit Court of the United States, for the Northern District of California,

Now, therefore, the condition of this obligation is such that if the above-named Albion Lumber Company shall prosecute said writ of error to effect, if it fails to make its plea good, shall answer all costs, then this obligation to be void, otherwise to remain in full force and virtue.

ALBION LUMBER CO.,
By Miles Standish, Manager.
J. S. KIMBALL, (Seal.)
DUNCAN MCNEE, (Seal.)

Sealed and delivered and taken and acknowledged before me this 9th day of April, 1895.

W. J. COSTIGAN,
Commissioner and Clerk U. S. Circuit Court,
Northern District of California.

UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco. } ss.

John S. Kimball and Duncan McNee, whose names are subscribed as the sureties on the foregoing bond, being severally duly sworn, depose and says: That he is a resident and free-holder within the State of California, and is worth the said sum of five hundred dollars, the sum in said bond specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. S. KIMBALL,
DUNCAN McNEE.

Subscribed and sworn to before me this 9th day of April, 1895.

W. J. COSTIGAN,
Commissioner U. S. Circuit Court, Northern District of California.

The forgoing bond approved.

A. B. HUNT,
Attorney for Plaintiff.

The foregoing bond is hereby approved, April 9, 1895.

JOSEPH McKENNA,
U. S. Circuit Judge.

[Endorsed]: Filed April 9th, 1895. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

MARIA DE NOBRA, Administratrix of the Estate of Jose De Nobra, Deceased,
Plaintiff,
vs.
ALBION LUMBER COMPANY (a Corporation),
Defendant.
No. 11,913.

Certificate to Transcript.

I, W. J. Costigan, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing ninety-five written pages, numbered from 1 to 95 inclusive, to be a full, true and correct copy of the record, papers and proceedings in the above and therein entitled cause, as the same remain of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing transcript of record is the sum of sixty-two ($62) dollars, and that said sum of sixty-two ($62) dollars was paid by Charles E. Wilson, Esq., one of the attorneys for the defendant, Albion Lumber Company.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Circuit Court, this day of April, A. D. 1895.

(Seal.) W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California.

United States of America—ss:

The President of the United States, to the Honorable, the Judge of the Circuit Court of the United States, for the Northern District of California, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court, before you, or some of you, between the Albion Lumber Company, (a Corporation), plaintiff in error, and Maria De Nobra, administratrix of the estate of Jose De Nobra, deceased, defendant in error, a manifest error hath happened, to the great damage of the said Albion Lumber Company (a Corporation), plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 9th day of May next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 9th day of April, in the year of our Lord one thousand eight hundred and ninety-five.

(Seal.) W. J. COSTIGAN,

Clerk of the United States Circuit Court for the Ninth Circuit, Northern District of California.

Allowed by

JOSEPH McKENNA,

Circuit Judge.

Return to Writ of Error.

The answer of the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

(Seal.) W. J. COSTIGAN,

Clerk.

[Endorsed]: No. 11,913. United States Circuit Court of Appeals for the Ninth Circuit. Albion Lumber Company, (a Corptn.), Plaintiff in Error, vs. Maria De Nobra, Admx., etc., Defendant in Error. Original

Writ of Error. Filed on Return Apr. 11th, 1895. W. J. Costigan, Clerk. Service of within writ and receipt of a copy thereof acknowledged this 10th day of April, 1895. A. B. Hunt, Attorney for Defendant in Error.

UNITED STATES OF AMERICA—SS.

The President of the United States, to Maria De Nobra, Administratrix of the estate of Jose De Nobra, deceased, greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 9th day of May next, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States, for the Northern District of California, wherein the Albion Lumber Company (a corporation), is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JOSEPH MCKENNA, Judge of the United States Circuit Court, for the Northern District of California, this 9th day of April A. D., 1895.

JOSEPH McKENNA,
U. S. Circuit Judge, Ninth Circuit.

[Endorsed]: No. 11,913. U. S. Circuit Court of Appeals, for the Ninth Circuit. Albion Lumber Company (a Corporation), Plff.* in Error, vs. Maria De Nobra, Admx. etc., Deft. in Error. Original Citation. Filed on Return April 11th, 1895. W. J. Costigan, Clerk. Service of within citation and receipt of a copy thereof acknowledged this 10th day of April, 1895. A. B. Hunt, Atty. for Deft. in Error.

[Endorsed]: No. 230. U. S. Circuit Court of Appeals for the Ninth Circuit. Albion Lumber Company (a Corporation), Plaintiff in Error, vs. Maria De Nobra, Admx., etc. Upon Writ of Error to the Circuit Court of the United States for the Northern District of California. Transcript of Record.

Filed, April 29, 1895.

F. D. MONCKTON,
Clerk.